Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

RAQUEL, a partnership,

Petitioner,

v.

EDUCATION MANAGEMENT CORPORATION, ART INSTITUTES INTERNATIONAL, INC., GEFFEN RECORDS, INC., NIRVANA, a partnership, ELIAS/SAVION, INC. and PHILIP ELIAS, individually,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the new and overly stringent test established by the United States Court of Appeals for the Third Circuit to evaluate whether a copyright registration is sufficient to support an infringement claim will impermissibly result in forfeitures of basic copyright protection and the right to bring suit and is, therefore, contrary to the purposes of the Copyright Act and the decisions of the other United States Courts of Appeals which have addressed this important issue of federal law.

PARTIES TO THE PROCEEDINGS

Petitioners

The petitioner is Raquel, a partnership. Raquel has no parent companies or nonwholly owned subsidiaries.

Respondents

The respondents are Education Management Corporation, Art Institutes International, Inc., Geffen Record, Inc., Nirvana, a partnership, Elias/Savion, Inc., and Philip Elias, an individual.

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Petitioner Raquel respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Third Circuit is reported at 196 F.3d 171 (3d Cir. 1999). A copy of the Opinion is included in the Appendix (Appendix A, 1a-33a). The Order of the United States District Court for the Western District of Pennsylvania which is the subject of the appeal before the Third Circuit has not been officially reported (Appendix B, 34a-35a). A related May 2, 1997 Report and Recommendation (Appendix E, 44a-54a), a related January 20, 1998 Order of Court (Appendix D, 41a-43a) and a related March 6, 1998 Report and Recommendation (Appendix C, 36a-40a) preceded the district court's final Order.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on November 9, 1999. Raquel filed a timely petition for rehearing with suggestion for rehearing *en banc*. This petition was denied on December 10, 1999. Chief Judge Becker and Judges Scirica, Nygaard, Alito and Rendell would have granted rehearing *en banc*. (Appendix F, 55a-56a). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTION AND STATUTORY PROVISIONS INVOLVED

U.S. Const., art. I, sec. 8, cl.8

The Congress shall have Power . . .

To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.

* * *

The following statutory provisions and regulations are involved, and the pertinent portions of these statutes and regulations are set forth in the Appendix (Appendix K, 81a-93a): 17 U.S.C. §§ 102, 408 (a) and (d), 410, 411 and 37 C.F.R. §§ 201.5(a), 201.5(b)(2)(ii)(A), 202.3 (b)(1)(ii).

STATEMENT OF THE CASE

Raquel, a partnership of musicians and songwriters, authored the music, lyrics and arrangement of an original musical composition entitled "Pop Goes the Music" (the "Song"). In late 1990, defendants Elias/Savion, Inc. and Philip Elias (collectively "Elias") selected Raquel to perform its Song in commercials Elias was producing for defendants EMC and the Art Institutes.

EMC entered into a license agreement with Raquel which permitted EMC to use Raquel's Song and Raquel's performance for a period of three years and for a purpose limited to the recruitment of students to EMC's educational programs. Raquel performed its obligations under the

agreement with EMC, and performed and recorded "Pop Goes the Music" for use by EMC in television commercials. Elias produced two commercials, both of which contained the Song and Raquel's performance of the Song, and a full-length video of Raquel's performance.

EMC, without Raquel's knowledge or consent, gave permission to defendants Geffen Records, Inc. (one of the largest record companies in the country) and the band Nirvana (an internationally known rock band) to use EMC's commercial, which contained Raquel's Song and Raquel's performance of the Song. As a result, Raquel's performance of part of its Song appears in the opening sequence of a full-length music video entitled "Nirvana Live! Tonight! Sold Out!" which was distributed throughout the United States. This took place after the license had expired and was for a purpose not permitted by the scope of the license. In addition, EMC continued to air the commercials which contained the Song after the expiration of the three year term of the license.

On July 17, 1995, Raquel filed an application for a copyright registration Form PA with the Register of Copyrights (the "1995 Registration") which identified the title of the work as "Pop Goes the Music" and described the "nature of material created by the author in which copyright is claimed" as "all music & lyrics & arrangement." The Form PA inadvertently described the nature of the work as "Audiovisual Work." (App. 76a-80a). Raquel used a videotape as the deposit medium accompanying its registration application (App. 3a; App. 84a).

Raquel received a Certificate of Registration dated July 18, 1995 from the Register of Copyrights (App. 76a-80a).

Raquel instituted the lawsuit at issue on December 27, 1996, asserting, *inter alia*, claims for copyright infringement under the federal Copyright Act, 17 U.S.C. § 101, *et seq.* The district court had subject matter jurisdiction over the action pursuant to 28 U.S.C. § 1331, as Raquel's complaint asserted claims under the federal Copyright Act.

On April 24, 1998, the district court dismissed Raquel's complaint for lack of subject matter jurisdiction based on the finding that Raquel had not obtained a valid copyright registration for its Song (App. 34a-35a; *see also* App. 36a-40a).

An earlier lawsuit filed by Raquel in October 1995 (the "1995 Action") preceded the case at issue. In a published opinion in the 1995 Action ("1996 Opinion"), the district court addressed Raquel's copyright registration and stated that it "finds that the inclusion of the term 'Audiovisual Work' was inadvertently included in the copyright application and, as a consequence, it did not invalidate the copyright of the music and lyrics to the song 'Pop Goes the Music'" (App. 70a-71a).[1] However, the district court dismissed the 1995 Action without prejudice because Raquel's complaint did not allege infringement of the Song (App. 73a).

Raquel then instituted the action that is the subject of this petition for writ of certiorari alleging that defendants had infringed Raquel's copyright in the Song. On May 2, 1997, the Magistrate Judge recommended dismissal of Raquel's

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[1] The same registration application and certificate -- PA 675-837 -- is the subject of both the 1996 Opinion and the subsequent lawsuit that is the subject of the appeal decided by the Third Circuit.

complaint, concluding that Raquel had not obtained a copyright registration for its Song (App. 44a-54a).

In a January 20, 1998 Order, stating adherence to its earlier findings in the 1996 Opinion that the certificate of copyright registration for Raquel's Song was valid, the District Judge declined to adopt the Report and Recommendation and denied the motion to dismiss (App. 41a-43a).

On March 6, 1998, upon defendants' motion for reconsideration, the Magistrate Judge again recommended dismissal of Raquel's complaint based on his conclusion that Raquel had not obtained a valid copyright registration for its Song (App. 36a-40a).

Then, without explanation for its deviation from its January 20, 1998 Order which acknowledged that it had concluded in the 1996 Opinion that Raquel had a valid certificate of copyright registration for the Song, the district court dismissed Raquel's complaint on April 24, 1998 (App. 34a-35a).

On November 9, 1999, the Third Circuit affirmed the district court's dismissal of Raquel's action. Judge Sloviter authored the majority opinion, in which the majority concluded that the 1995 Registration did not provide Raquel with a copyright registration in its Song (App. 1a-22a). Judge Alito filed a dissenting opinion (App. 22a-33a).

On December 10, 1999, the Third Circuit denied Raquel's timely petition for reargument and suggestion for rehearing *en banc*. Five of the 10 judges of the United States Court of Appeals for the Third Circuit who considered

Raquel's petition would have granted rehearing *en banc*. (App. 55a-56a).

REASONS FOR GRANTING THE WRIT

This matter involves a question of exceptional importance because the decision and majority opinion of the United States Court of Appeals for the Third Circuit conflicts with the authoritative decisions of the other United States Courts of Appeals that have addressed the issue -- *i.e.*, Under what circumstances will an error contained in a copyright registration application invalidate the copyright and render the registration incapable of supporting an infringement action brought by the undisputed and rightful owner of the copyright.

The decision of the Third Circuit in this case stands in stark contrast to the prevailing law. Contrary to the legal principles enunciated by other Courts of Appeals, the Third Circuit now stands alone by formulating a new test for assessing copyright registration applications which will work a forfeiture of valid copyrights and deprive authors of original works from vindicating their copyrights through an infringement action. As stated by Judge Alito in his dissenting opinion, the majority issued a decision which "elevates form over substance and works a forfeiture of a valid copyright because of a misstatement that the trial court had already labeled inadvertent" (App. 22a).

Under the Copyright Act, copyright protection exists without registration. Hence, the case law construing the Act holds that technical irregularities in a registration application do not prevent a copyright owner from vindicating its rights. Under the precedent of the United States Courts of Appeals

for the First, Second, Sixth, and Ninth Circuits (those Courts of Appeals which have specifically addressed this issue), an inadvertent error in a copyright registration application will neither invalidate the copyright nor render the registration incapable of supporting an infringement action.

Under the standard of evaluation adopted by these Courts of Appeals, Raquel's copyright registration of the Song is sufficient to support a claim for infringement of the Song. However, the Third Circuit held that Raquel should be deprived of the opportunity to bring an infringement action because of what, at worst, can be characterized as a technical misstatement on Raquel's copyright registration application.

The test set forth in the Third Circuit's published opinion deviates drastically from the well-settled law governing the assessment of copyright registration applications. In the place of this law, the Third Circuit has fashioned a new rule which, as stated by Judge Alito in his dissent, "focus[es] singularly" on the only portion of the application that was in error (App. 31a).

This matter presents the question of whether a plaintiff who has submitted a copyright registration application that contains what can be characterized as a misstatement or error can still assert an infringement claim. Faced with this question, the federal courts have uniformly and overwhelmingly been "most lenient" and have excused errors "affecting virtually every material aspect of a copyright registration application." The courts have invalidated a copyright only where the applicant knowingly withheld or misstated information in its application and the Copyright Office might have rejected the application had it known of the omitted or misstated information. In other words, a

registration is invalid only if the error is material and not inadvertent.

To determine materiality, the Third Circuit asked whether the Copyright Office would have issued Raquel a registration in an audiovisual work. However, under the decisions of other Courts of Appeals, the proper question is *not* whether Raquel could register a copyright in the video. Instead, the question is whether the Copyright Office would have issued a registration certificate in the work which is the subject of the copyright claimant's suit for infringement -- here, Raquel's Song.

The Third Circuit did not, because it could not, identify any reason why the Copyright Office would have declined to issue Raquel a copyright registration in its Song. Instead, the court turned the test for materiality on its head by asking whether Raquel would be entitled to a copyright in an audiovisual work -- the only misstated portion of the application. This is a new test for materiality that differs from the standards applied by all other Courts of Appeals.

By framing the test for materiality with a singular focus on the incorrect aspect of the registration application and ignoring all other statements on the application, the Third Circuit deviates from precedent and predestines Raquel to failure. However, the Third Circuit provides no cogent rationale for this new rule or its departure from the prevailing law. There is no principled way to reconcile the Third Circuit's decision in this case with the overwhelming precedent and the purposes of the Copyright Act.

It appears that the core of the Third Circuit's stated rationale for its departure from the prevailing law is its view that an error in a claimant's description of the "nature of the

work" will be treated and evaluated differently from all other errors. As stated by Judge Alito in dissent, "This argument mischaracterizes the case law. No court of appeals has ever suggested that an inadvertent error in a registration statement -- even an error as to the nature of the work -- can bar an infringement action where the work would have been copyrightable had the registration contained a correct statement of facts" (App. 29a).

The Third Circuit's decision also is contrary to the precedent of other Courts of Appeals on the issue of "inadvertence." Under the prevailing test, an error will be deemed "inadvertent" unless it is shown that the claimant intended to defraud or intentionally mislead the Copyright Office. By concluding that Raquel's error was not inadvertent without finding an intent to mislead or defraud, the Third Circuit has promulgated some sort of new test for inadvertence without specifically articulating the new standard.

This Court should grant Raquel's petition for a writ of certiorari to resolve the conflict between the decision of the Third Circuit -- which is wrong as a matter of law -- and the decisions of other Courts of Appeals. Furthermore, the Third Circuit's decision is contrary to the purposes of the Copyright Act and, in consequence, this case presents an important question of federal law that should be resolved by this Court.

This Court should resolve the conflict to provide guidance to the lower courts and to ensure that the rights of those who created original works of authorship are not forfeited.

ARGUMENT

I. The Purposes of the Copyright Act

The source of copyright protection is the United States Constitution. The framers of the Constitution empowered Congress to "promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." U.S. Const., art. I, sec. 8, cl. 8.

The fundamental purpose of the Copyright Act is to benefit the public "from the labors of authors." *United States v. Paramount Pictures*, 334 U.S. 131, 158 (1947)(*quoting*, *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932). The "reward to the author or artist serves to induce release to the public of the products of his creative genius." *Paramount Pictures*, 334 U.S. at 158.

As this Court has stated regarding copyright law:

> However, it is "intended definitely to grant valuable, enforceable rights to authors, publishers, etc., *without burdensome requirements*; 'to afford greater encouragement to the production of literary [or artistic] works of lasting benefit to the world.'"

Mazur v. Stein, 347 U.S. 201, 219 (1954) (*quoting*, *Washingtonian Pub. Co. v. Pearson*, 306 U.S. 30, 36 (1939)) (*emphasis added*).

II. The Third Circuit's Decision is Contrary to the Authoritative Decisions of Other United States Courts of Appeals Which Hold That Inadvertent and Immaterial Errors in a Registration Application Do Not Invalidate the Copyright or Render the Registration Incapable of Supporting an Infringement Action

Under the prevailing law, Raquel's 1995 Registration is a valid copyright registration of the Song which will support its infringement claim. Contrary to this well-established law, the Third Circuit majority fashioned a new test which resulted in its conclusion that Raquel does not have a valid copyright registration in its Song. In consequence, under the court's decision, Raquel has lost the protection in its original musical composition afforded by the federal Copyright Act and cannot bring a claim for infringement of the original work which no one disputes that Raquel authored.

Copyright protection exists without registration, but registration is a prerequisite to a suit for infringement. 17 U.S.C. §§ 408(a) and 411. However, the law is clear that the registration requirement is not onerous and, further, that irregularities and errors in the registration will not defeat a suit for infringement.

Federal courts have consistently and "overwhelmingly" held that an innocent and immaterial error or omission in a copyright registration application will neither invalidate the copyright nor render the registration incapable of supporting a suit for infringement. *Urantia Found. v. Kristen Maaherra*, 114 F.3d 955, 962-63 (9th Cir. 1997) (characterizing the case law in support of this proposition as "overwhelming"); *Data Gen. Corp. v. Grumman Sys. Support Corp.*, 36 F.3d 1147, 1161-62 (1st Cir. 1994) (*citing*,

Masquerade Novelty v. Unique Indus., Inc., 912 F.2d 663, 667, 668, n. 5 (3d Cir. 1990), and stating, "It is well established that immaterial, inadvertent, errors in an application for copyright registration do not jeopardize the validity of the registration.");[2] *Eckes v. Card Prices Update*, 736 F.2d 859, 861-62 (2d Cir. 1984); *Harris v. Emus Records Corp.*, 734 F.2d 1329, 1335 (9th Cir. 1984); *Advisors, Incorporated v. Wiesen-Hart, Inc.*, 238 F.2d 706, 708 (6th Cir. 1956), *cert. denied*, 353 U.S. 949 (1957) (the Copyright Act grants "valuable rights to persons who create such matter which is copyrightable" and "useless technicalities are not to be allowed to cut down the benefits conferred")(*quoting*, *United States v. Backer*, 134 F.2d 533, 536 (2d Cir. 1943)); *Baron v. Leo Feist, Inc.*, 173 F.2d 288 (2d Cir. 1949).[3]

Professor Nimmer has observed:

> The courts generally have been most lenient . . . with respect to any innocent error contained in an application for a registration certificate. Simply stated, a misstatement or clerical error in the registration application, if unaccompanied by fraud, should neither invalidate the copyright nor render the

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[2] In an earlier opinion, the Third Circuit itself acknowledged this standard with approval. *Masquerade Novelty*, 912 F.2d at 667, 668, n. 5. In *Masquerade Novelty*, the Third Circuit stated that the view that inadvertent errors in registration applications will render a copyright incapable of supporting an infringement action "has not gained acceptance with the courts." *Masquerade Novelty*, 912 F.2d at 668, n. 5.

[3] *See* Judge Alito's dissenting opinion (App. 28a-29a)(citing cases).

registration certificate incapable of supporting an infringement action.

M. Nimmer & D. Nimmer, Nimmer on Copyright, § 7.20, at 7-202 (1998) (citing cases) (hereinafter, "Nimmer on Copyright"). "To illustrate the courts' liberal approach to erroneous registrations," Nimmer cites numerous "cases [which] have forgiven even *serious mistakes* on the registration certificate." Nimmer on Copyright § 7.20, at 7-204 (*emphasis added*) (citing cases in notes 27-38). Professor Nimmer concluded, "Based on the above authorities, the conclusion follows that, notwithstanding the stray draconian application, courts generally follow a liberal approach to upholding even erroneous applications." Nimmer on Copyright, § 7.20, at 7-207.

Likewise, Professor Goldstein notes that "[c]ourts have been . . . forgiving toward errors or omissions in registration applications . . ., [and] have excused innocent *errors or omissions affecting virtually every material aspect of a copyright registration application.*" P. Goldstein, Copyright § 3.12.3 at 3:127-29 (1998) (hereinafter "Goldstein") (*emphasis added*) (citing cases in notes 21-27).[4]

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[4] Courts have forgiven errors pertaining to matters such as (1) failure to claim copyright in the elements of the work that later became the subject of the infringement action; (2) the identity of the author or of the copyright claimant; (3) the title of the work; (4) the owner of the copyright; (5) failure to identity the original matter in the work; (6) whether the work is a new edition; and (7) whether the work is a derivative work. Nimmer on Copyright, § 7.20, at 7-204, 7-205 (citing cases in notes 27-38); Goldstein, § 3.12.3 at 3:127-29 (citing cases in notes 21-27).

Courts have invalidated copyrights based on errors in registration applications "only in situations where the applicant knowingly withheld or misstated information in its application and the Copyright Office might have rejected the application had it known of the omitted or misstated information." Goldstein, § 3.12.3, at 3:129-30 (citing cases); *see also* Nimmer on Copyright, § 7.20 at 7-202-03.

A. The Third Circuit's Decision Establishes a Test for "Immateriality" That is Contrary to Authoritative Decisions of Other United States Courts of Appeals

In the 1995 Registration, Raquel correctly identified the title of the work as "Pop Goes The Music" -- the title of the Song (App. 77a, 79a). Raquel did not identify the title of the work as "Before the Crowd Roars" -- the title of the audiovisual work (*see* App. 31a)(Alito, J., dissenting). Raquel correctly identified the nature of its authorship as "[a]ll music & lyrics & arrangements" -- the components of a song, not a video (App. 77a, 79a). The *only* misstatement on the 1995 Registration was the inadvertent description of the nature of the work as an "audiovisual work."

In reaching its conclusion that Raquel did not have a valid registration in its Song, contrary to uniform and overwhelming federal precedent, the Third Circuit's analysis "focus[es] singularly" on the use of the term "audiovisual work" and ignores every other word contained on the registration (App. 31a)(Alito, J., dissenting). The Third Circuit majority stated, "In determining the materiality of a misstatement in a copyright registration, we examine whether the inaccuracy might have influenced the Copyright Office's decision to issue the registration" (App. 10a).

However, the Third Circuit fashioned a new test for determining materiality that is inconsistent with the standard promulgated by other Courts of Appeals. The Third Circuit more specifically framed the question as whether the Copyright Office would have issued Raquel a registration in an *audiovisual work* by stating, "Had the Register of Copyrights known that Raquel did not author the audiovisual work identified in its registration, it is likely that this rather fundamental misstatement would have occasioned the rejection of Raquel's application" (App. 11a).

Under the decisions of other Courts of Appeals, the proper question is *not* whether Raquel could register a copyright in the video. Instead, the question is whether the Copyright Office would have issued a registration in the work which is the subject of the copyright claimant's suit for infringement -- here, Raquel's Song. By framing the test for materiality with a singular focus on the misstated aspect of the registration application and ignoring all other statements on the application, the Third Circuit deviates from precedent and predestines Raquel to failure.[5]

The Third Circuit suggests that in the other cases in which immaterial errors have been excused "the registrant had the right to the work described in the registration form" (App. 13a). The Third Circuit then recites that Raquel "does not have a right to the audiovisual work described in the

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[5] Furthermore, as Judge Alito stated in dissent, defendants were not prejudiced by the misstatement on the registration application (App. 29a-30a)(*citing*, *Feist*, 173 F.2d at 290). *See also Advisors, Incorporated*, 238 F.2d at 708 ("useless technicalities are not to be allowed to cut down the benefits conferred" particularly where there is no "prejudice" to the defendant); *Urantia*, 114 F.3d 963-64.

registration form" (App. 13a). By concluding that Raquel did not have a right in the "work" described in the registration, the Third Circuit holds, without a principled rationale, that the "nature of the work" line on the registration application somehow trumps the "title of the work" line, as well as the "nature of authorship" line on a copyright registration application.[6]

However, the Third Circuit articulates no reason for treating this portion of the registration application differently or for considering it in isolation from the other language on the application. Nor has any other Court of Appeals done so.

Addressing the majority's rationale, Judge Alito cited the precedent of the First, Second and Ninth Circuits, as well

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[6] Musical compositions are entitled to copyright protection and Raquel, as the author of the musical composition, is the proper copyright claimant. 17 U.S.C. § 102. A Form PA may be used to register musical compositions. *See* 37 C.F.R. § 202.3 (b)(1)(ii). A letter from a Senior Examiner of the Copyright Office buttresses the conclusion that the Copyright Office would not have rejected the application for a registration in the Song had it known all of the circumstances (App. 84a-86a). The letter shows that the Copyright Office understood that, by the 1995 Registration, Raquel was stating a claim in the "music, lyrics and, arrangement" of the Song and that even though the Song was "fixed on the soundtrack of a videotape, no claim was stated in the motion picture production" (App. 84a). The examiner also stated that the Copyright Office understands that the "reference to 'audiovisual work' on the application . . . did not extend the claim into the motion picture authorship present on the videotape, but simply identified the deposit format in which the song was fixed" (App. 84a).

as an earlier opinion of the Third Circuit (App. 28a), and stated:

> The majority attempts to distinguish this long line of cases by pointing to the fact that Raquel's registration misidentified the nature of the work in question. This argument mischaracterizes the case law. No court of appeals has ever suggested that an inadvertent error in a registration statement -- even an error as to the nature of the work -- can bar an infringement action where the work would have been copyrightable had the registration contained a correct statement of facts.

(App. 29a).

In fact, other Courts of Appeals have excused even more egregious errors -- including those where the registration application did not address the entire work which was the subject of the infringement action. For instance, in *Baron v. Leo Feist, Inc.*, 173 F.2d 288 (2d Cir. 1949), the plaintiff's registration referred only to the arrangement of the subject song. Despite this, the Second Circuit excused the misidentification of the nature of a copyrighted work and held that the registration would support a claim for infringement of the song's melody. *Feist*, 173 F.2d at 290. (*See* App. 29a)(Alito, J., dissenting).

By wrongly focusing on the inadvertent use of the term audiovisual work in the 1995 Registration -- which registered a copyright in the music, lyrics and arrangement of the Song, the Third Circuit affirmed the dismissal of Raquel's complaint based on the largely irrelevant finding that Raquel could not assert a copyright ownership interest in the video (App. 13a).

The Third Circuit's rationale for its decision -- namely, that Raquel did not own an audiovisual work -- is not supported by law or logic and is contrary to the purposes of the Copyright Act. The question is not whether Raquel has a copyright ownership interest in the video. The question -- as framed by other Courts of Appeals -- is whether Raquel would have been granted a copyright in the material it claims to have authored and which is the subject of its infringement claim.

The Third Circuit never asks the question that it should have asked -- *i.e.*, whether the Copyright Office would have issued a registration for a work titled "Pop Goes the Music" (which no one disputes is a song and is the subject of Raquel's infringement claim) for which Raquel authored the "music & lyrics & arrangements." If the test for materiality were framed this way, consistent with precedent of other Courts of Appeals, then the answer of necessity would be -- "Yes."

The results of the cases decided by other Courts of Appeals would have been different if the test fashioned by the Third Circuit were applied to the circumstances of those cases. For instance, in *Urantia*, the copyright claimant incorrectly described the work as a "work for hire" and described the copyright owner as a "proprietor of a work for hire." However, the work at issue was *not* a "work for hire." Instead, it was a "composite work" and the copyright owner was a "proprietor of a composite work." *Urantia*, 114 F.3d at 961-63.

Using the Third Circuit's test which singularly focuses on the incorrect aspect of the application, the question in *Urantia* would have been framed as "would the Copyright Office have issued the claimant a registration in a work for hire (as the work was described in one portion of the

registration)?" Because the work was not a "work for hire" the answer would have been -- "No." This conclusion would have led to a result contrary to that reached by the Ninth Circuit which excused the errors. *Urantia*, 114 F.3d 963-64.

The rule fashioned by Third Circuit is inconsistent with the uniform decisions of other Courts of Appeals and is contrary to the purposes of the Copyright Act. Indeed, a leading commentator has characterized decisions such as this as "draconian application[s]" of the law governing copyrights. Nimmer on Copyright, § 7.20, at 7-207. This Court should resolve this conflict to provide guidance to the lower courts and to ensure that valid copyrights are not forfeited.

B. The Third Circuit's Decision Establishes a Test for "Inadvertence" That is Contrary to Authoritative Decisions of Other United States Courts of Appeals

The decisions of other Courts of Appeals uniformly hold that an error in a copyright registration application will be deemed "inadvertent" unless it is shown that the claimant intended to defraud or intentionally mislead the Copyright Office. *See Urantia*, 114 F.3d at 963; *Eckes*, 736 F.2d at 861-62; *Data General*, 36 F.3d at 1161; *Advisors, Incorporated*, 238 F.2d at 708. *See also* Nimmer on Copyright, § 7.20 at 7-202-03; Goldstein, § 3.12.3, at 3:129-30 (citing cases). The Third Circuit's decision concludes that Raquel's error was not inadvertent, but without finding that there was an intent to mislead or defraud. There simply was nothing before the Third Circuit which even remotely

suggested that Raquel intended to defraud the Copyright Office (*see* App. 25a (Alito, J., dissenting); App. 71a, 74a).[7]

Hence, it appears that Third Circuit has promulgated a new test for inadvertence without specifically articulating the new standard. Consequently, litigants and the district courts are left with virtually no guidance on how to evaluate errors to determine inadvertence.[8]

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[7] In the 1996 Opinion, the district court issued express findings on both the issues of materiality and inadvertence, concluding that Raquel had obtained a valid copyright registration in the Song, that Raquel had a copyright interest in the music, lyrics and arrangement of the Song, that the inclusion of the term audiovisual work was inadvertent, and that there was no intent to mislead or defraud the Copyright Office (App. 71a, 74a; *see also* App. 24a-25a (Alito, J., dissenting)). The Third Circuit condoned the district court's disregard of these earlier findings when rendering its decision in the case at bar and itself "brushed aside these clear and binding determinations" (App. 25a)(Alito, J., dissenting). As Judge Alito also concluded in dissent, these prior findings of the district court were binding under the doctrines of collateral estoppel and the law of the case (App. 23a-27a), and Raquel was "clearly prejudiced" by the district court's "abrupt and unexplained about-face" and refusal to adhere to its earlier findings (App. 26a). Thus, the Third Circuit has signaled that litigants cannot rely on earlier findings of the courts in the same or closely related cases and that disregard of the doctrines of the law of the case and collateral estoppel will be countenanced.

[8] Upon review of this matter, this Court should address the Third Circuit's decision regarding Raquel's registration of its performance of the Song (App. 17a-20a). The Third Circuit's singular focus on Raquel's use of the term audiovisual work in the 1995 Registration likewise resulted in the conclusion that Raquel had not perfected a copyright registration of the performance

CONCLUSION

The decision of the Third Circuit in this case is inconsistent with the decisions of the First, Second, Sixth and Ninth Circuits on the issue of the standard for determining whether a copyright registration is valid and will serve as a predicate to an infringement claim under the Copyright Act. Furthermore, the Third Circuit's decision is contrary to the purposes of the Copyright Act because it promulgated a new test that will result in forfeitures of valid copyrights. Here, there is no dispute that Petitioner Raquel is the rightful owner of the copyright in the original musical composition which it

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through a supplemental registration Form CA (App. 81a-83a). In the 1996 Opinion, the district court concluded that the 1995 Registration could not serve as a registration of Raquel's performance because the application did not refer to the performance (App. 73a-74a). In the wake of this decision, Raquel filed with the Register of Copyrights a supplemental registration Form CA which amplified the information provided in the 1995 Registration to add "performance" as an "additional description of [Raquel's] authorship in the work" (App. 82a -83). The Copyright Act permits the filing of supplementary registrations to "amplify the information given in a registration." 17 U.S.C. § 408(d); 37 C.F.R. § 201.5(a). One approved type of amplification is to provide "[a]dditional information that could have been given but was omitted at the time the basic registration was made . . ." 37 C.F.R. § 201.5(b)(2)(ii)(A) (language in effect at the time CA was filed). In the 1995 Registration, Raquel identified its authorship in the Song as "music, lyrics and arrangement." Raquel's status as "author" of the audio performance of the Song was "additional information that could have been given but was omitted" at the time of the registration. 37 C.F.R. § 201.5(b)(2)(ii)(A). Thus, the Form CA filed by Raquel on November 6, 1996 effectuated a registration of Raquel's authorship in the performance (App. 81a-83).

authored. However, under the Third Circuit's decision, Raquel's copyright is essentially forfeited.

This Court should grant Raquel's petition for a writ of certiorari to resolve the conflict between the Courts of Appeals. Guidance from this Court is necessary to prevent lower courts from precluding those who have created original works of authorship from vindicating their rights through an action under the federal Copyright Act.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

[Filed November 9, 1999]

No. 98-3321

RAQUEL, a partnership *Appellant,*	)
v.	)
EDUCATION MANAGEMENT CORPORATION; ART INSTITUTES INTERNATIONAL, INC.; GEFFEN RECORDS INC.; NIRVANA, a partnership; ELIAS/SAVION, INC.; PHILIP ELIAS, Individually *Appellees,*	)

On Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. Civ. No. 96-cv-02349)
District Judge: Hon. Donald J. Lee

Argued: April 5, 1999

Before: SLOVITER, ALITO and ALARCON,*
Circuit Judges

OPINION OF THE COURT

SLOVITER, *Circuit Judge.*

Before us is an appeal from the order of the District Court dismissing for lack of subject matter jurisdiction this copyright infringement action filed by appellant Raquel. The court based its decision on Raquel's failure to show registration of its copyright claim in accordance with the Copyright Act, which is a prerequisite for the filing of an action for infringement. 17 U.S.C. § 41 l(a).

Raquel is a partnership comprising musicians and songwriters who authored the music, lyrics, and arrangement for an original song entitled "Pop Goes the Music" ("the Song"). Raquel granted defendants Elias/Savion Advertising Agency, Inc. ("Elias/Savion") and Education Management Corporation ("EMC"), a license to use the Song and Raquel's performance for three years in a television commercial produced by Elias/Savion that advertised the educational programs offered by Art Institutes International (an entity operated by EMC). As compensation for its license of the Song and its performance, Raquel received a separate, full-length music video of some four minutes' duration. Like the commercial, the video was produced by Elias/Savion.

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* Hon. Arthur L. Alarcon, Senior Judge, United States Court of Appeals for the Ninth Circuit, sitting by designation.

In July 1995, Raquel, through counsel, filed a federal copyright registration form with the Register of Copyrights. It identified the nature of the work for which copyright registration was sought as an "Audiovisual Work," the title of the work as "Pop Goes the Music," and the nature of authorship as "All music and lyrics and arrangement." App. at 48. Raquel deposited with the application a videotape apparently containing both the commercial and the full-length music video.

In October 1995, Raquel filed a copyright infringement action under the Copyright Act, 17 U.S.C. § 101, in the United States District Court for the Western District of Pennsylvania against EMC, Geffen Records, and the music group Nirvana. Raquel alleged in its complaint that EMC violated the licensing agreement by continuing to run the commercial beyond the three-year period provided for in the agreement and that EMC, acting through Art Institutes International, infringed its copyright by entering into an agreement with defendants Geffen and Nirvana for the use of a portion of the commercial containing the Song "Pop Goes the Music" in a music video for Nirvana. EMC then filed a third-party complaint against Elias/Savion seeking indemnification and/or contribution for any liability it may have had toward Raquel.

On motion of Elias/Savion, the District Court dismissed the complaint against all defendants for lack of subject matter jurisdiction. *Raquel v. Education Mgmt.*

Corp., 955 F. Supp. 433 (W.D. Pa. 1996).[1] The court noted that in the complaint Raquel alleged that the "musical video and TV commercial (hereinafter referred to as the 'Subject Work'), upon being fixed in the tangible medium of a videotape, was published by [Raquel] with a notice of copyright on February 20, 1991" and that the work "contains material wholly original in [Raquel] that is copyrightable subject matter." *Id.* at 439. The court then noted that Raquel had registered the copyright as an "audiovisual work" entitled "Pop Goes the Music," whereas Mr. Elias of Elias/Savion, not Raquel, was the acknowledged author of the commercial and music video. *Id.* at 438. Raquel therefore did not have a copyrightable interest in the work that formed the basis of its lawsuit because it was undisputed that Elias/Savion was the sole author of the audiovisual. *Id.* at 439. The court concluded that because the complaint based the infringement claim upon the commercial (in which Raquel had no interest) and not upon the musical work, it had no subject matter jurisdiction and would grant the motion to dismiss. *Id.* at 440.

The District Court nonetheless denied attorneys fees to Elias/Savion. The court, which had previously stated that "the term 'Audiovisual Work' was inadvertently included," *id.* at 439, stated that Raquel has a "copyrightable interest" in the Song, and "did not knowingly fail to advise the copyright office of facts which might have led to the rejection of its registration application." *Id.* at 440.

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[1] The complaint, which is not in the appendix, is quoted in the District Court's first opinion. *See Raquel*, 955 F. Supp. at 439.

On December 2, 1996, after the dismissal of its first complaint, Raquel's counsel filed a supplemental registration form with the Copyright Office. This document added "performance of song Pop Goes the Music" to the description of the nature of the authorship in the earlier registration, but made no other changes. App. at 67. On December 20, 1996, Raquel, again through counsel, filed yet another supplemental registration form. In this form, Raquel sought to "amplify" line one of the registration form, that describing the "nature of the work," by filing two copies of the video of Raquel performing the Song. By way of explanation, Raquel stated on the form: "Original filing was made with videocassette which contained 'Video' of RAQUEL performing song, 'Pop Goes the Music', and also contained other items as to which claimant does not assert copyright." App. at 55.

The following week, Raquel filed a second copyright infringement action against the same defendants who were named in the first complaint. The second complaint made essentially the same factual allegations, but asserted that the copyright that was the subject of the infringement was Raquel's copyright in the Song. The defendants moved to dismiss for lack of subject matter jurisdiction, asserting, *inter alia,* that Raquel's copyright registration was insufficient to support jurisdiction for an action alleging infringement of its copyright in the Song.

The District Court initially denied the defendants' motion. On the defendants' motion for reconsideration, the court, approving and adopting a report and recommendation from the Magistrate Judge, granted the motion and dismissed the case. The District Court's dismissal was based on its conclusion that neither Raquel's copyright registration nor its

supplemental registration was sufficient to confer jurisdiction in an action for infringement of the Song. Raquel timely appealed.

II.

The Copyright Act provides: "[N]o action for infringement of the copyright in any work shall be instituted until registration of the copyright claim has been made in accordance with this title." 17 U.S.C. §411(a). Thus, the issue is whether Raquel has met the jurisdictional prerequisite for maintaining a copyright infringement action, namely a valid registration in the work that has allegedly been subject to an infringing use. Our review of the District Court's dismissal for lack of subject matter jurisdiction is plenary. *See Singh v. Daimler-Benz AG,* 9 F. 3d 303, 305 (3d Cir. 1993).

A.

We first confront Raquel's argument that the District Court erred in failing to adhere to its determination in the first lawsuit "that the 1995 Registration was a valid registration of the Song." Appellant's Br. at 25. There is language in the District Court's 1996 opinion which, standing alone, might lead one to conclude that the District Court opined that Raquel did have a registered copyright in its Song despite its description of the work as an "Audiovisual work." At one point in its opinion, the court stated that the inclusion of the term "Audiovisual Work" in the application "did not invalidate the copyright of the music and lyrics to the song 'Pop Goes the Music';" *id.* at 439, and at another point stated that Raquel "had a *copyrightable* interest in the [Song];" *id.*

at 440 (emphasis added). The District Court stated that the characterization as an audiovisual work was inadvertent, and then stated, "[A]n innocent omission or inclusion in a registration will not invalidate the copyright or render it incapable of supporting an infringement action." *Id.* at 439. However, because the District Court dismissed the case for want of jurisdiction on the ground that Raquel had only pleaded a copyright interest in the commercial and the video, in which Raquel had no copyrightable interest, and the case before it raised the issue of the validity of the registration of the audiovisual work, its statement suggesting that the registration was valid vis-a-vis the *Song* was not necessary to the decision and is at most dictum. It did not, therefore, bind the District Court in this case, which is a new lawsuit with a separate civil action number. Of course, as the first dismissal was never appealed to this court, any statement or inference raised by the District Court could not bind us.

We note parenthetically that both the magistrate judge and the district court judge in this case are, respectively, the judges who recommended dismissal and who dismissed the first complaint. Consequently, although we appreciate why Raquel might have drawn the opposite conclusion, we conclude that the issue whether Raquel had a registered copyright in the Song was not decided. We turn then to that question, which is central to the District Court's subject matter jurisdiction in this case.

B.

Although a failure properly to register a work does not invalidate the copyright itself, it does preclude the maintenance of an infringement action until such time as the

purported copyright holder obtains a valid registration. *See Arthur Rutenberg Homes, Inc. v. Drew Homes, Inc.*, 29 F.3d 1529, 1531-32 (11th Cir. 1994); 17 U.S.C. § 411(a); Melville B. Nimmer & David Nimmer, 2 Nimmer on Copyright §§ 7.16[A][1], 7.16[B] (1997) [hereinafter Nimmer & Nimmer].

Raquel contends that its initial registration – in which it characterized the nature of the copyrighted work as an "Audiovisual Work" – and its supplemental registration – in which it added description of the nature of the authorship – are sufficient to invoke the subject matter jurisdiction of the federal courts. Raquel presses this contention on two fronts. First, it urges that its 1995 registration is sufficient, despite its imprecision, to support an infringement action based upon its Song. Second, Raquel argues that its performance of the Song is itself a copyrightable interest, and that its initial and supplemental registration forms together constitute a valid registration that would support a lawsuit charging infringement of Raquel's copyright in the performance of the Song. We address these arguments in turn.

C.

Raquel contends that its designation of the nature of its work as an "Audiovisual Work" in its copyright registration should not bar it from bringing this infringement action for infringement of the Song because the designation was merely an inadvertent and immaterial error. In pressing this argument, Raquel places considerable reliance on our decision in *Masquerade Novelty, Inc. v. Unique Industries, Inc.*, 912 F.2d 663 (3d Cir. 1990). In that case, the plaintiff Masquerade, a manufacturer of novelty masks, claimed

infringement of its copyright in its nose masks (specifically, pig, elephant and parrot nose masks). The district court granted summary judgment to the defendant, ruling, *inter alia*, that Masquerade had omitted material facts from its copyright registration. On appeal, the defendant, a competing seller of nose masks, urged that Masquerade did not hold valid copyrights because it failed to specify that the masks were to be worn by humans. It contended that the omitted information would have led the Copyright Office to have declined to issue the registrations (apparently on the assumption that the Register of Copyrights would have found the masks to be costumes, which are not copyrightable).

On appeal, we determined that the supposed omission was immaterial because the applications identified the articles as "nose masks." In doing so, we acknowledged that "[i]t has been consistently held that a plaintiff's knowing failure to advise the Copyright Office of [material] facts . . . constitutes grounds for holding the registration invalid and incapable of supporting an infringement action." *Id.* at 667. However, because we concluded that the omission was not a material one, we held it unnecessary to decide "whether an inadvertent omission of material information from a submission to the Copyright Office renders the copyright unenforceable, deprives the copyright owner of its § 410(c) presumption [of validity], or has no legal effect." *Id.* at 668. We nonetheless observed in a footnote that the "view that an inadvertent omission from a registration application will render a plaintiff's copyright incapable of supporting an infringement action has not gained acceptance with the courts," and also stated that "[i]t may be that the correct approach in situations where there has been a material, but inadvertent omission, is to deprive the plaintiff of the benefits of § 410(c)

[incontestability after five years] and to require him to establish the copyrightability of the articles he claims are being infringed." *Id.* at 668 n.5.

Hence, our opinion in *Masquerade* supports the general proposition that an inadvertent and immaterial misstatement will not invalidate a copyright registration, a proposition on which there is broad consensus in the federal courts. *See, e.g., Data Gen. Corp. v. Grumman Sys. Support Corp.*, 36 F.3d 1147, 1161 (1st Cir. 1994); *Eckes v. Card Prices Update,* 736 F.2d 859, 861-62 (2d Cir. 1984). Less clear, however, is the effect of a misstatement that is material but inadvertent. *See Data General,* 36 F.3d at 1163 ("No court has suggested that a registration premised in part on an unintentional material error would fail to satisfy the jurisdictional requirement of Section 411(a)."); *Masquerade,* 912 F.2d at 668 & n.5. As our discussion below will demonstrate, however, we need not decide that question for the purposes of this appeal because, on the undisputed record before the court, we cannot conclude that the misstatement was immaterial and unknowingly made.

Raquel readily concedes that the designation of the nature of its work on its 1995 copyright registration form was inaccurate. It urges, however, that the designation of the nature of the work as an "Audiovisual Work" was immaterial and that in any event it was inadvertent and therefore should not bar jurisdiction over this lawsuit.

In determining the materiality of a misstatement in a copyright registration, we examine whether the inaccuracy might have influenced the Copyright Office's decision to issue the registration. *See Data General* 36 F.3d at 1161 ("In

general, an error is immaterial if its discovery is not likely to have led the Copyright Office to refuse the application"); *Eckes*, 736 F.2d at 861-62 ("'[K]nowing failure to advise the Copyright Office of facts which might have occasioned a rejection of the application constitute[s] reason for holding the registration invalid and thus incapable of supporting an infringement action'" (quoting *Russ Berrie & Co., Inc. v. Jerry Elsner Co., Inc.*, 482 F. Supp. 980, 988 (S.D.N.Y. 1980))).

In this case, the registration identifies the work as an audiovisual work entitled "Pop Goes the Music," rather than the kind of work on which the complaint is based – a song entitled "Pop Goes the Music." The Copyright Act defines "Audiovisual works" as "works that consist of a series of related images which are intrinsically intended to be shown by the use of machines or devices such as projectors, viewers, or electronic equipment, together with accompanying sounds." 17 U.S.C. § 101. One need have no special expertise in intellectual property law to apprehend that an audiovisual work is facially very different from a song, which would fall under the rubric of "musical works, including any accompanying words," 17 U.S.C. § 102(a)(2).

We conclude that this mischaracterization is material. Had the Register of Copyrights known that Raquel did not author the audiovisual work identified in its registration, it is likely that this rather fundamental misstatement would have occasioned the rejection of Raquel's application.[2]

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[2] Raquel argues that the Register of Copyrights could not have been misled by the registration form because a letter from the

To be sure, there are numerous cases suggesting that many kinds of inadvertent and immaterial errors in copyright registration forms will be excused. Courts have forgiven plaintiffs for having misidentified the author of a work, *see, e.g., Thomas Wilson & Co. v. Irving J. Dorfman Co.*, 433 F.2d 409 (2d Cir. 1970) (listed president of corporation instead of corporation); *Testa v. Janssen*, 492 F. Supp. 198 (W.D. Pa. 1980) (listed author's assignee), or misidentified

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Copyright Office dated May 14, 1997 shows the Copyright Office understood Raquel's 1995 registration stated a claim in the "music, lyrics, and arrangement" of the Song. However, this letter to Raquel's counsel, sent in response to telephone conversations between Raquel's counsel and the examiner who signed the letter, was dated nearly two years after the registration was filed and does not indicate what the Register of Copyrights would have likely done if all of the relevant facts were presented at the time of the registration. *See* App. at 226. In fact, the letter is ambivalent as to the nature of Raquel's claim. In the letter, the examiner states, "If your client owned all rights in the production at the time the original Form PA application was filed to register the song, you may . . . ," which suggests that the Copyright Office was not apprised of the salient fact that Raquel had not authored the commercial or video. Moreover, this document is not one that may be considered in a motion-to-dismiss setting. Although the court may consider, on a motion to dismiss, certain documents that are outside the pleadings, such as the registration form and supplemental registration forms expressly relied on in the complaint, *see In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410 (3d Cir. 1997) ("document *integral to or explicitly relied* upon in the complaint" may be considered when deciding motion to dismiss (quoting *Shaw v. Digital Equip. Corp.*, 82 F.3d 1194, 1220 (1st Cir. 1996)), this letter is not such a document as it is wholly extraneous to the pleadings.

the owner of the copyright, *see Wales Indus. v. Hasbro Bradley, Inc.*, 612 F. Supp. 510 (S.D.N.Y. 1985) (listing as copyright claimant the exclusive licensee). The leading treatises support this view as well. *See, e.g.*, Nimmer & Nimmer § 720[B] at 7-208 ("The courts generally have been most lenient . . . with respect to any innocent error contained in an application for a registration certificate."); 1 Paul Goldstein, *Copyright* § 3.12.3, at 345 (1989) ("Courts have excused innocent errors or omissions affecting virtually every material aspect of a copyright registration application.").

However, Raquel has not cited, nor have we found, a case in which the misstatement to be excused is as fundamental as the one in this case. Here, Raquel misidentified the *nature* of the work in such a way as to suggest an attempted registration in a work not authored by the registrant, namely, the commercial advertisements authored, as the parties agree, by Elias/Savion.[3] In all of the cases excusing immaterial errors the registrant had the right to the work described in the registration form. Raquel, however, does not have the right to the audiovisual work described in the registration form.

Raquel points to *Urantia Foundation* v. *Maaherra*, 114 F.3d 955 (9th Cir. 1997), *and Harris v. Emus Records Corp.*, 734 F.2d 1329 (9th Cir. 1984), as instances where

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[3] Raquel relies heavily on the fact that the registration form identified the "nature of the authorship" as "all music, lyrics, and arrangements" but we find that this characterization of the nature of the authorship adds only ambiguity rather than clarity to the registration form. We cannot conclude that this ambiguity cures the misstatement as to the nature of the work being registered.

courts have forgiven registrants for misidentifying a work. We find both inapposite. Neither involves misidentification of a type or degree that is equivalent to that presented in the case at bar. In *Urantia*, the court considered the validity of a copyright renewal form in which the applicant referred to itself as "the proprietor of a work made for hire" rather than, more accurately, "the proprietor of a composite work." 114 F.3d at 962. The court concluded that the misidentification of "a particular type of proprietorship" did not affect the validity of the copyright renewal. *Id.* at 962. There was no question as to the fundamental nature of the work itself, which was in that case a book believed to have been "authored by celestial beings and transcribed, complied and collected by mere mortals." *Id.* at 956. Hence, the imprecision excused by the court in *Urantia* was not, as in the present case, one that presented any likelihood of confusion as to the work for which copyright protection was sought.

Nor does the Ninth Circuit's decision in *Harris* offer support for Raquel. In *Harris*, the court determined, as a "subsidiary issue[ ]," that a registration form incorrectly identifying singer Emmylou Harris as the author of a work did not bar Harris's infringement suit where subsequent transfers resulted in Harris's ownership of the copyright before suit was instituted and the defendant showed no prejudice from the misidentification of the author. 734 F.2d at 1335. Thus, *Harris*, like *Urantia,* did not involve a registration form that purported to register a copyright in a work other than the one on which the infringement suit was based.

Consequently, despite the generally accommodating stance taken where the misstatement in the registration form

does not go to the nature of the work for which protection is sought, we find in this case a serious imprecision in identifying the work itself. A copyright registration that misidentifies the nature of a copyrighted work fails to give proper notice to the Register of Copyrights regarding the nature of the intellectual property for which protection is sought. As a result, it is not unreasonable to demand some accuracy on this matter.

D.

We also cannot find on this record that the misstatement in the registration form was an innocent error. Defendants argue, and we agree, that there is no record evidence that the misstatement was inadvertent. It would be difficult to draw the inference of inadvertence from this record. Counsel for Raquel (who is not counsel in this appeal) executed the registration form on Raquel's behalf on July 18, 1995, denoting the nature of the work as an "Audiovisual Work." The same attorney then filed the first infringement action on October 11, 1995, identifying the work forming the basis of Raquel's infringement claim as the commercial and the video, both clearly audiovisual works. *See Raquel*, 955 F. Supp. at 440. It is difficult to conclude that an attorney who executed a registration form for an "Audiovisual Work" and then proceeded to file a complaint alleging that the defendants infringed Raquel's copyright in audiovisual works intended the copyright to cover the Song.

Furthermore, as the complaint alleges, the Song was authored in 1990, although the video and commercials were created in 1991. The registration form identifies the year in which creation of the work was completed as 1991, the year

in which the video and commercials were produced, which further suggests that the work for which registration was sought in 1995 was the video and commercials, as the registration form itself indicated, rather than the Song itself. Nor did Raquel, after the dismissal of its first suit, file a new copyright registration form that correctly identified the nature of the work for which it sought copyright as a musical work or song before instituting an infringement action based upon the Song.

Based on the information on record, we cannot conclude that the inaccuracy in Raquel's 1995 registration was either immaterial or inadvertent. Raquel filed a registration form suggesting authorship of an audiovisual work in which it had no copyrightable interest. Although we need not go as far as did the court in *Whimsicality, Inc. v. Rubie's Costume Co.*, 891 F.2d 452 (2d Cir. 1989), which labeled as "fraud on the Copyright Office" a registration for what proved to be plaintiff's Halloween costumes (which are not entitled to copyright protection) which plaintiff had described on its application as "soft sculptures" (which are entitled to copyright protection),[4] the fact remains that Raquel filed a

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[4] On a subsequent Rule 60(b)(3) motion, the District Court in *Whimsicality, Inc. v. Rubie's Costume Company*, 836 F. Supp. 112 (E.D.N.Y. 1993), considered an affidavit by the section head of the Copyright Office in which he stated that the "description of the works as a soft sculpture did not and does not constitute a representation to the Copyright Office that the works in question have no useful function [the issue in that case]." *Id.* at 115. Based on that affidavit, the court reversed its earlier position and held the Copyright Office had not been misled. The letter from a copyright

registration form suggesting authorship of an audiovisual work in which it had no copyrightable interest. There is a fundamental difference between an audiovisual work and a song. We conclude therefore that the 1995 copyright registration could not serve as the jurisdictional basis for this suit notwithstanding that this complaint, unlike the first, sues for infringement of the Song.

E.

Raquel's second argument is that it has, by means of its supplemental registration, a registered copyright in Raquel's performance sufficient to invoke the court's subject matter jurisdiction on a claim that the defendants infringed its copyright in that performance.

There is no doubt that one can have a copyrightable interest in a particular performance of a song. *See, e.g., Woods v. Bourne Co.*, 60 F.3d 978, 983 (2d Cir. 1995) ("[P]erformances include television broadcasts of the Song as captured in movies and television programs and radio broadcasts of the Song as captured in sound recordings."); *Daboub v. Gibbons*, 42 F.3d 285, 288 (5th Cir. 1995) ("The distinction may be summed up as the difference between a copyright in a Cole Porter song and a copyright in Frank Sinatra's performance of that song. The former would be a

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examiner submitted by Raquel in this case as part of its objections to the magistrate judge's initial report and recommendation, see note 2 *supra*, is not comparable to the affidavit submitted in *Whimsicality*.

musical work copyright and the latter would be a sound recording copyright, although both may be embodied in the same phonorecord." (quoting 1 M. Nimmer, *Copyright* § 4.06, p. 4-34 n. 1)). However, once again Raquel founders because it has not demonstrated that it has registered a copyright in its performance so as to satisfy the jurisdictional requirement of 17 U.S.C. § 411(a).

Raquel's interest in its performance was not decided in the first action. The court did note that Raquel had not applied for nor received a copyright of its performance of the Song and stated that it would make no determination regarding Raquel's right to copyright its performance. *Raquel,* 955 F. Supp. at 440. Assuming that Raquel has a copyrightable interest in the performance of the Song as captured on the video, we must decide whether Raquel's supplemental registration is sufficient to register a copyright in the performance, when the initial registration was for an "Audiovisual Work," and, if so, whether Raquel's complaint has alleged an infringement of its performance of its Song.

Raquel's attempt to use its supplemental registration as a basis for asserting a claim that the defendants infringed its copyright in its performance rests on an erroneous understanding of the function of supplemental registration. The applicable regulation governing supplementary registration states:

> (2) Supplementary registration may be made either to correct or to amplify the information in a basic registration. For the purposes of this section:

(i) A "correction" is appropriate if information in the basic registration was incorrect at the time that basic registration was made, and the error is not one that the Copyright Office itself should have recognized;

(ii) An amplification is appropriate:

(A) To supplement or clarify the information that was required by the application for the basic registration and should have been provided, such as the identity of a co-author or co-claimant, but was omitted at the time the basic registration was made, or

(B) To reflect changes in facts, other than those relating to transfer, license, or ownership of rights in the work, that have occurred since the basic registration was made.

(iii) Supplementary registration is not appropriate:

(A) As an amplification, to reflect a change in ownership that occurred on or after the effective date of the basic registration or to reflect the division, allocation, licensing or transfer of rights in a work; or

> (B) To correct errors in statements or notices on the copies of phonorecords of a work, or to reflect changes in the content of a work[.]

37 C.F.R. § 201.5(b).

Raquel's effort to use its supplementary registration to change the nature of the work as set forth in its original registration does not neatly fit into the concepts of "correction" or "amplification" as used in the regulation. By filing the supplemental registration, Raquel did not seek to cure "incorrect information" in the initial registration, "supplement or clarify" omitted information, or "reflect changes in facts." Rather, by means of the supplemental registration, Raquel sought to change the nature of the work for which a copyright is claimed. This attempt is more akin to the prohibited use of supplemental registration set forth in § 201.5(b)(2)(iii)(B), *viz.*, "to reflect changes in the content of a work."

What Raquel urges is essentially that the supplemental registration should supersede the original registration. That is, rather than the "audiovisual work" for which it had registered a copyright, Raquel sought to copyright a "performance" through its supplemental registration. That such a use of the supplemental registration process is at odds with the intent of the regulation is underscored by the statutory provision enabling the regulation, 17 U.S.C. § 408(d). That section permits the promulgation of regulations allowing authors to use supplemental registration "to correct an error in a copyright registration or to amplify

the information given in a registration" but clearly states: "The information contained in a supplementary registration augments but does not supersede that contained in the earlier registration."

Moreover, even if we were to assume arguendo that Raquel's supplemental registration is a sufficient ground for jurisdiction in an action for infringement of its putative copyright in the performance of the Song, Raquel's argument is undone by the wording of its complaint. Determination whether an action arises under federal copyright law is made by reference to the statement of the claim in the complaint. *See Vestron, Inc. v. Home Box Office, Inc.*, 839 F.2d 1380, 1381 (9th Cir. 1988). "Where there is a fatal flaw on the face of a complaint that purports to assert an infringement action, the suit should be dismissed for lack of subject matter jurisdiction." *Id.* at 1382.

Raquel's complaint is barren of any allegation of an infringement of a copyright in Raquel's performance of the Song. To the contrary, the complaint alleges infringement of the Song itself, in which, as we here hold, Raquel has not registered a copyright. In paragraph 13 Raquel states that it "created the music, lyrics and arrangements for an original composition entitled 'Pop Goes the Music' (hereinafter 'Plaintiff's Work')." App. at 14. In paragraph 44, Raquel refers to the use of the "Plaintiff's Work" by EMC in advertising after the end of the three year period of the licensing agreement without permission from Raquel thereby infringing upon its copyright. App. at 20. Raquel states in Paragraph 53 that defendants, by virtue of entering into a "Videoshow Agreement" with Geffen and Nirvana,

committed a further act of infringement of "Plaintiff's Work." App. at 22.

In short, throughout the counts of the complaint, Raquel alleges infringement of "Plaintiff's Work," which paragraph 13 defines as the music, lyrics, and arrangements of its Song, not its performance. Although the complaint includes among its factual allegations the averment that Raquel is the sole proprietor of the Song "and Plaintiff's performance of the song in an audiovisual work," App. at 18, no count of the complaint alleges a violation of that interest. Hence, even on a charitable reading of the complaint, it is not possible to construe it as alleging an infringement of Raquel's performance as distinct from its Song. Nor could it amend to so allege, as it has failed to perfect a copyright in its performance.

III.

We conclude that Raquel does not have a registered copyright in either its Song or the performance of its Song that would entitle it to bring suit. Accordingly, we will affirm the District Court's dismissal of this action for lack of subject matter jurisdiction.

ALITO, *Circuit Judge,* dissenting:

I believe that the majority's decision elevates form over substance and works a forfeiture of a valid copyright because of a misstatement that the trial court had already labeled inadvertent. I dissent for two reasons. First, the majority ignores the prior findings and holding of the District Court regarding the validity of Raquel's copyright in its song

"Pop Goes the Music." These determinations were clearly the law of the case and entitled to deference. Second, as a matter of substantive law, Raquel's registration should not be deemed invalid merely because of an inadvertent mistake which caused no prejudice to the defendants in this action. There is no evidence in the record that compels a finding of fraudulent intent, and the majority's resolution of factually ambiguous issues against Raquel is inappropriate in the context of a motion to dismiss on the pleadings.

I.

The District Court's initial determination that Raquel's 1995 registration was a valid registration of the song was clearly the law of the case, and the District Court's failure, without explanation, to adhere to its earlier determination unfairly prejudiced Raquel and was in error. The majority compounds this error by itself disregarding this preclusive finding.

The District Court, in its 1996 judgment, made clear and specific findings and concluded that Raquel had validly registered its copyright in the music and lyrics of the song. Because Raquel identified the title of the work as "Pop Goes the Music" and the nature of authorship as "[a]ll music & lyrics & arrangement," the District Court found that "it is sufficiently clear that Raquel intended to obtain a copyright in its song, "Pop Goes the Music.'" *Raquel v. Education Mgmt. Corp.*, 955 F. Supp. 433, 439 (W.D. Pa. 1996). Although the Registration incorrectly described the nature of the work as an "Audiovisual Work," the court explicitly held that "the term 'Audiovisual Work' was inadvertently included in the copyright application and, as a consequence, *it did not*

invalidate the copyright of the music and lyrics to the song, 'Pop Goes the Music.'" *Id.* (emphasis added). The District Court went on to hold that "because Raquel had a copyrightable interest in the song 'Pop Goes the Music' it did not knowingly fail to advise the copyright office of facts which might have led to the rejection of the registration application." *Id.* at 440. Although the District Court proceeded to dismiss the case for lack of jurisdiction, this was simply because Raquel's *complaint* referred only to the full-length music video (in which it held no copyright), and not to the song itself (in which it clearly did). *See id.* Indeed, as the District Court noted in its Order of January 20, 1998:

> [t]he previous dismissal . . . [was] not based upon a finding that plaintiff's Certificate of Copyright Registration was invalid; to the contrary, Magistrate Judge Caiazza, as approved by this Court, found that certificate to be valid, despite some inadvertent errors in plaintiff's application. The dismissal was, rather, based upon plaintiff's failure to allege in the complaint any infringement of the copyrighted *song,* as opposed to the audiovisual material containing the song which plaintiff had not copyrighted."

App. 230 (emphasis in original). The District Court thus made three important rulings in the 1996 action, which became the law of the case: (1) that Raquel had intended to register its copyright in the song and not in the video; (2) that the inclusion of the term "Audiovisual Work" in the registration was merely inadvertent; and (3) that therefore, the

registration was valid as to the music and lyrics of the song, if not to the video itself.

The majority attempts to brush aside these clear and binding determinations by characterizing them as "at most dictum." However, the District Court's findings in regard to the copyrights of the music and lyrics were essential to an important part of its judgment on the merits - its denial of Elias/Savon's motion for attorney's fees. Elias/Savon had claimed that "an award of attorney's fees is appropriate . . . since the Plaintiff and its counsel had full knowledge of the falsity of the statement made to the copyright office at the time the copyright registration was filed." *Raquel*, 955 F. Supp. at 437. The Court was thus required to make a concrete finding on the inadvertence issue - with which the issue of the copyright's validity was inextricably intertwined - as a predicate to resolving the attorney's fees question. Significantly, the defendants never appealed the Court's denial of attorney's fees, or its predicate findings on inadvertence and validity.

The law of the case doctrine "'expresses the practice of courts generally to refuse to reopen what has been decided.'" *Williams v. Runyon*, 130 F.3d 568, 573 (3d Cir. 1997) (quoting *Messenger v. Anderson*, 225 U.S. 436, 444 (1912)). Law of the case restrictions apply to "subsequent rulings by the same judge in the same case or a closely related one." *Casey v. Planned Parenthood of Southeastern Pennsylvania*, 14 F.3d 848, 856 n. 11 (3d Cir. 1994). Although a trial judge has the power to reconsider an earlier decision, its authority to do so is limited by two prudential considerations: "First, the court must explain on the record the reasoning behind its decision to reconsider the prior

ruling. Second, the court must take appropriate steps so that the parties are not prejudiced by reliance on the prior ruling." *Williams*, 130 F.3d at 573.

In the present case, neither the District Court's Order nor the Magistrate Judge's report presents any explanation of the decision to ignore the District Court's earlier finding that the registration was valid. Moreover, Raquel was clearly prejudiced by the court's abrupt and unanticipated about-face on this question. After the District Court dismissed the first action without prejudice, Raquel read the Court's decision as any reasonable plaintiff would - that although its complaint had been defective, it nevertheless had a valid registered copyright in the song.[1] In reliance on the District Court's holding, it filed a new complaint which cured the pleading defects identified by the Court, but failed to reexamine the certificate of registration, which the Court had already determined was capable of supporting an infringement claim based on the Song. It was not until the District Court's reconsideration of the defendant's motion to dismiss in the second action that Raquel had any indication that the Court's earlier ruling was not what it seemed to be. However, by this point, the District Court had dismissed Racquel's claims *with prejudice*.

Absent the District Court's assurances on the matter, Raquel could have filed a supplementary registration under 17

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[1] Even the majority concedes that "[t]here is language in the District Court's 1996 opinion which, standing alone, might lead one to conclude that the District Court opined that Raquel did have a registered copyright in its Song despite its description of the work as an 'Audiovisual work.'"

U.S.C. § 408(d) in order to perfect its registered copyright in the song. Because the District Court, by its earlier ruling and expression, did not alert Raquel to its concern about the validity of the copyright in the song, Raquel was undeniably prejudiced. *See Williams,* 130 F.3d at 573. The District Court was thus foreclosed from revisiting its earlier, unambiguous ruling that Raquel had validly registered its copyright in the song's music and lyrics.

Collateral estoppel principles would also support this conclusion. The collateral estoppel doctrine prevents the relitigation of issues that have been decided in a previous action. Under the law of this Circuit, four factors must be met before the application of collateral estoppel is appropriate: [1] the previous determination was necessary to the decision; (2) the identical issue was previously litigated; (3) the issue was actually decided in a decision that was final, valid, and on the merits; and (4) the party being precluded from relitigating the issue was adequately represented in the previous action. *See Hawksbill Sea Turtle v. Federal Emergency Mgmt. Agency,* 126 F.3d 461, 475 (3d Cir. 1997). In the present case, the District Court made explicit findings as to inadvertence and validity in its decision dismissing the earlier action and refusing Elias/Savon's motion for attorney's fees. Defendants are thus precluded from relitigating these issues, and the majority has erred in holding otherwise.

II.

Even if the validity of the registration had not been foreclosed by the District Court's earlier ruling, Raquel's registration was clearly sufficient, as a substantive matter, to

perfect its copyright interest in the music and lyrics of the song.

"The case law is overwhelming that inadvertent mistakes on registration certificates do not . . . bar infringement actions, unless the alleged infringer has relied to its detriment on the mistake, or the claimant intended to defraud the Copyright Office by making the misstatement." *Urantia Found. v. Maaherra,* 114 F.3d 955, 963 (9th Cir. 1997).[2] *See also Masquerade Novelty v. Unique Indus., Inc.,* 912 F.2d 662, 668 n.5 (3d Cir. 1990) ("Unique's view that an inadvertent omission from a registration application will render a plaintiff's copyright incapable of supporting an infringement action has not gained acceptance with the courts."); *Data Gen. Corp. v. Grumman Sys. Support Corp.,* 36 F.3d 1147, 1161-62 (1st Cir. 1994) ("It is well established that immaterial, inadvertent, errors in an application for copyright registration do not jeopardize the validity of the registration."); *Eckes v. Card Prices Update,* 736 F.2d 859, 861-62 (2d Cir. 1984) ("Only the 'knowing failure to advise the Copyright Office of facts which might have occasioned a rejection of the application constitute[s] reason for holding the registration invalid'") (quoting *Russ Berrie & Co., Inc. v. Jerry Elsner Co., Inc.,* 482 F. Supp. 980, 988 (S.D.N.Y. 1980)); 2 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 7.20[B] at 7-208 ("a misstatement . . . in the registration certificate, if unaccompanied by fraud, should

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[2] Although the majority attempts to distinguish *Urantia* on its facts, the *rule* announced in *Urantia* – and seemingly not disputed by the majority – clearly covers the facts of the case at bar.

neither invalidate the copyright nor render the registration certificate incapable of supporting an infringement action").

The majority attempts to distinguish this long line of cases by pointing to the fact that Raquel's registration misidentified the nature of the work in question. This argument mischaracterizes the case law. No court of appeals has ever suggested that an inadvertent error in a registration statement - even an error as to the nature of the work - can bar an infringement action where the work would have been copyrightable had the registration statement contained a correct statement of facts. *See Masquerade Novelty*, 912 F.2d at 668 n.5.[3] *See also 2.* Nimmer & Nimmer § 7.20[B] at 7-208 n. 19 (collecting cases). Indeed, in *Baron v. Leo Feist, Inc.*, 173 F.2d 288 (2d Cir. 1949), the Second Circuit dealt with precisely the issue of misidentification of the nature of a copyrighted work in its registration. In *Feist, the* plaintiff's registration certificate referred only to the arrangement of the subject song. Nevertheless, the Second Circuit held that the registration was sufficient to maintain an action based on infringement of the song's melody because there was no contention that the defendants were "misled by the certificate of registration." *Id.* at 290.

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[3] In dictum, the *Masquerade Novelty* Court did suggest that "[i]t may be that the correct approach in situations where there has been a material, but inadvertent omission, is to deprive the plaintiff of the benefits of § 410(c) and to require him to establish the copyrightability of the articles he claims are being infringed." 912 F.2d at 688 n.5. Even under this somewhat more stringent standard, Raquel would be entitled to reversal of the District Court's dismissal and an opportunity to prove copyrightability before that court.

In the present case, there is no dispute that Raquel's interest in the music and lyrics to the song were copyrightable, or that the registration would have been valid had it correctly stated the nature of the subject work. Nor is there any intimation that the defendants were at all prejudiced by the error in the registration. Clearly, the defendants in this suit, like those in *Feist* were not misled by the registration as to the scope of the protected work. In light of these considerations, Raquel's inadvertent error cannot be grounds for dismissing its suit for lack of subject matter jurisdiction.

III.

The majority attempts to bolster its holding by making its own factual finding that Raquel committed a fraud on the Copyright Office. It grounds this argument in its assertion that "[i]t is difficult to conclude that an attorney who executed a registration form for an 'Audiovisual Work' and then proceeded to file a complaint alleging that the defendants infringed Raquel's copyright in audiovisual works intended the copyright to cover the song."[4]

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[4] The majority's reference to *Whimsicality, Inc. v. Rubie's Costume Co.*, 891 F.2d 452 (2d Cir. 1989) is inapposite. First, *Whimsicality* concerned a motion for summary judgement, not a motion to dismiss. A factual finding of fraudulent intent is simply inappropriate at the pleadings stage. Moreover, the judgment of the *Whimsicality* court was later vacated in light of an affidavit from the Copyright Office stating that it had not, in fact, been misled by Whimsicality's registration statement. *See Whimsicality, Inc. v. Rubie's Costume Co., Inc.*, 836 F. Supp. 112 (E.D.N.Y. 1993). Indeed, the facts of the *Whimsicality* case should serve to caution this Court against making hasty findings of bad faith before

I believe that the majority, in focusing singularly on the use of the term "Audiovisual Work," has ignored the array of evidence in the record that supports a finding of inadvertence. In its 1995 copyright application, Raquel properly identified the title of the work as "Pop Goes The Music" -- *not* as "Before the Crowd Roars," the title of the commercial. App. 48. In the same application, Raquel identified the nature of its authorship as "[a]ll music & lyrics & arrangements" – a clear indication of its intent to register the song and not the video. App. 48, 50. Moreover, Raquel's copyright counsel, Edward C. Terreri, stated under oath that the copyright application was filed in good faith "with no intent to seek any greater rights for RAQUEL than those to which RAQUEL is entitled," *Raquel*, 955 F. Supp. 433, 439 n. 1 (quoting Terreri Declaration), and that he "had no intent to defraud the Copyright Office . . . or anyone else in connection with attempts to obtain copyright protection for Raquel." App. 186. These facts led the District Court itself to hold (in my opinion correctly) that the inclusion of the term "Audiovisual Work" was merely an inadvertent error. *See* Part I, *supra*.

The fragments of evidence that the majority does assemble do not support, much less compel, a finding of advertence or fraudulent intent.[5] The mere inclusion of the

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the record below has been fully established.

[5] The majority claims that it need not go so far as to find "fraud on the Copyright Office" in order to nullify Raquel's copyright. This is a distinction without a difference: the majority's findings of advertence and materiality are, in substance, a finding of fraud. *See Whimsicality, Inc. v. Rubie's Costume Co., Inc.*, 836

term "audiovisual work" in the registration and original complaint may simply indicate a confusion on the part of counsel arising from the fact that the song Raquel intended to copyright was fixed on the soundtrack of a videotape [6] Raquel's failure to amend the registration as to the nature of the work similarly evinces no fraudulent intent, but merely a reasonable reliance on the District Court's 1996 holding that it had already validly registered its copyright in the music and lyrics of the song. In any event, the majority's resolution of the factually ambiguous question of advertence against Raquel at the pleading stage violates the basic principle that, for purposes of a motion to dismiss, the complaint must be viewed in the light most favorable to the plaintiff, and all well-pleaded factual allegations taken as true. *See Conley v. Gibson,* 355 U.S. 41, 45-46 (1957).

IV.

For these reasons, I would conclude that Raquel does have a registered copyright in the song "Pop Goes the Music" that entitles it to bring suit, and I respectfully dissent.

F. Supp. 112, 118 (E.D.N.Y. 1993) ("two elements are required to find [copyright fraud]: an intent to mislead and behavior which would be objectively likely to mislead").

[6] Raquel's copyright counsel Edward C. Terreri stated under oath that "I described the *media on which Raquel performed the Song* as 'audiovisual' because that seemed logical and also that decision was concurred in by a specialist in the Copyright Office with whom I communicated." App. 187-88 (emphasis added).

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

[Filed April 24, 1998]

No. 96-2349

RAQUEL, a partnership,
Plaintiff,
v.

EDUCATION MANAGEMENT CORPORATION, ART INSTITUTES INTERNATIONAL, INC., GEFFEN RECORDS, INC., NIRVANA, a partnership, ELIAS/SAVION ADVERTISING, INC., and PHILIP ELIAS, Individually,
Defendants.

MEMORANDUM ORDER

On December 27, 1996, the plaintiff Raquel filed a second copyright infringement action against the defendants. Its original copyright infringement action filed at No. 95-1620 was dismissed for lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1).

On May 2, 1997, United States Magistrate Judge Francis X. Caiazza recommended that Raquel's Complaint in this civil action be dismissed for lack of subject matter jurisdiction again pursuant to Federal Rule of Civil Procedure 12(b)(1). The parties were allowed ten (10) days from the date of service to file objections. Upon an initial review of the objections, the undersigned granted Raquel's objections to the Report and Recommendation thereby denying the defendants' Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b) (1).

The defendants subsequently filed a Joint Motion for Reconsideration under Federal Rule of Civil Procedure 60 which was referred back to Magistrate Judge Caiazza. On March 6, 1998, Magistrate Judge Caiazza filed at Report and Recommendation which recommended that the defendants' Joint Motion for Reconsideration be granted. The parties were allowed ten (10) days from the date of service to file objections. Service was made on all parties and objections were filed on March 23, 1998. After a de novo review of the pleadings and documents in the case, together with the report and recommendation and objections thereto, the following order is entered:

AND NOW, this 24th day of April, 1998;

IT IS HEREBY ORDERED that based upon the defendants' Joint-Motion for Reconsideration, their Motion to Dismiss the plaintiff's Complaint pursuant to Federal Rule of Civil Procedure 12(b) (1) is granted.

/s/_____
Donald J. Lee
U.S. District Court Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

[Filed March 6, 1998]

No. 96-2349

RAQUEL, a partnership,
Plaintiff,

v.

EDUCATION MANAGEMENT CORPORATION, ART INSTITUTES INTERNATIONAL, INC., GEFFEN RECORDS, INC., NIRVANA, a partnership, ELIAS/SAVION ADVERTISING, INC., and PHILIP ELIAS, Individually,
Defendants.

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

I.

Recommendation

It is recommended that the Joint Motion for Reconsideration filed by the Defendants Education Management Corporation, Elias/Savion Advertising, Inc., Philip Elias, Geffen Records, Inc., and Nirvana be granted.

II.

Report

A. Procedural Background

Raquel's original copyright infringement claim against the defendants at No. 95-1620 was dismissed for lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b) (1). The dismissal was without prejudice to Raquel to file a Complaint which met the threshold subject matter jurisdiction requirements.

On December 27, 1996, Raquel filed a second copyright infringement action. On May 2, 1997, it was recommended that the Plaintiff's Complaint be dismissed pursuant to Federal Rule of Civil Procedure 12(b) (1) for lack of subject matter jurisdiction. Raquel objected to the recommendation on the basis of this court's opinion in Radeschi v. Commonwealth, 846 F.Supp. 416 (W.D. Pa. 1993). On January 21, 1998, United States District Court Judge Donald J. Lee granted Raquel's Objections to the Magistrate Judge's Report and Recommendation thereby denying the defendants' Motion to Dismiss pursuant to

Federal Rule of Civil Procedure 12(b) (1). This matter is currently before the court on the Joint Motion for Reconsideration filed by defendants Education Management Corporation (EMC), Elias/Savion Advertising, Inc. (Elias/Savion), Philip Elias (Elias), Geffen Records, Inc. (Geffen) and Nirvana (Nirvana) under Federal Rule of Civil Procedure 60.

B. Legal Standard

The power of a district court to grant or to deny relief under Federal Rule of Civil Procedure 60 is within the discretion of the court. Laskey v. Continental Products Corporation, 804 F.2d 250, 256 (3d Cir. 1986). The exercise of the courts' discretion should include a liberal interpretation of the rule for the purpose of achieving substantial justice. Laskey, 804 F.2d at 256.

C. Discussion

In Raquel's initial copyright infringement claim against the defendants which was filed at No. 95-1620, the court noted that Raquel intended to claim a copyright in its song "Pop Goes the Music". Raquel v. Education Management Corporation, 41 U.S.P.Q. 2d 1434, 1438 (1996). Raquel based that infringement claim upon an "audiovisual work" which was not authored by any its members. Consequently, the court granted the defendant's Rule 12(b) (1) motion to dismiss for lack of subject matter jurisdiction because Raquel never possessed a copyright interest in the audiovisual work. Raquel, 41 U.S.P.Q. at 1439. Similarly, the undersigned recommended that Raquel's subsequent Complaint be dismissed under Rule 12(b) (1) because Raquel did not have

a property interest in the "audiovisual work" which formed the basis of its copyright infringement claim. (Doc. No. 10 at 8.)

To support its objections to a dismissal of its Complaint under Federal Rule of Civil Procedure 12(b) (1), Raquel argued that its copyright infringement claim is not legally insufficient. (Doc. No. 11 at 5.) In that regard, Raquel alleged that ". . . inadvertently, the deposited medium was described rather than the work itself, consisting of words and music to a song." (Id).

At issue is certificate of registration number Pa 675-837 which copyrighted an audiovisual work in the form of a Commercial that included Raquel's song "Pop Goes the Music" (Pl.'s Compl. Ex. No. 4.) However, as detailed in Raquel v. Education Management Corporation, 41 U.S.P.Q. 2d 1434 (1996) and the Report and Recommendation filed on May 2, 1997, Raquel undisputedly does not have a copyrightable interest in the Commercial. (Magistrate Judge's Report and Recommendation at 6.)

On December 20, 1996, Raquel filed a supplementary registration in which it disclaimed any interest in the Commercial, and claimed ownership in the video of Raquel performing the song "Pop Goes the Music". (Pl.'s Compl. Ex. No. 5.) Nevertheless, Raquel does not have a copyrightable interest in the video because Elias was its sole author. (Magistrate Judge's Report and Recommendation at 9.)

"Where there is a fatal flaw on the face of a complaint that purports to assert an infringement action the suit should

be dismissed for lack of subject matter jurisdiction." Vestron Inc. v. Home Box Office, 839 F.2d 1380, 1382 (9th Cir. 1988). Here, Raquel's copyright infringement claim is fatally flawed by the "inadvertent" description of the deposited medium rather than the song. Raquel does not own a property interest in the video; therefore, it can not maintain an infringement action which is based upon a copyright registration for an audiovisual work. Accordingly, the defendants' Joint Motion for Reconsideration should be granted.

In accordance with the Magistrate's Act, 28 U.S.C. § 636 (b) (1) (B) and (C), and Rule 72.1.4 (B) of the Local Rules for Magistrates, objections to this Report and Recommendation are due by March 23, 1998. Responses to objections are due by April 2, 1998.

March 5, 1998
Date of Order

/s/_____
Francis X. Caiazza
U. S. Magistrate Judge

cc: Magistrate Judge Francis X. Caiazza
all counsel of record

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

[Filed January 20, 1998]

No. 96-2349

RAQUEL, a partnership,
Plaintiff,

v.

EDUCATION MANAGEMENT CORPORATION, ART INSTITUTES INTERNATIONAL, INC., GEFFEN RECORDS, INC., NIRVANA, a partnership, ELIAS/SAVION ADVERTISING, INC., and PHILIP ELIAS, Individually,
Defendants.

ORDER OF COURT

AND NOW, this 20th day of January, 1998, after consideration of the Report and Recommendation filed by Magistrate Judge Caiazza (Document No. 10), Plaintiff's Objections thereto, Defendants' Partial Objection thereto, and the respective responses to said objections, this Court declines

to adopt the Report and Recommendation essentially for the reasons set forth in plaintiff's objections. Accordingly,

IT IS HEREBY ORDERED as follows:

1. Plaintiff's Objections to the Magistrate Judge's Report and Recommendation (Document No. 11) are **GRANTED**;

2. The Motion of Defendants to Dismiss Plaintiff's Complaint Pursuant to F.R.C.P. 12(b)(1), 12(b)(6), and 12(h)(3) (Document No. 6) is **DENIED** without prejudice to their right to assert the substantive issues raised therein following discovery, by way of timely motions for summary judgment;

3. Defendants' Partial Objection to Magistrate's Recommendation to Dismiss Plaintiff's Complaint without Prejudice and to Deny Defendants Attorney's Fees (Document No. 12) is **DENIED**.

Defendants argue, in both their partial objection and motion to dismiss, that the present action is barred by application of res judicata, because of the dismissal of the previous lawsuit between these same parties by this Court at Civil Action No. 95-1620, involving alleged infringment of the same copyright. This argument is without merit. The previous dismissal of each cause of action at Civil Action No. 95-1620 was explicitly "without prejudice," and not based upon a finding that plaintiff's Certificate of Copyright Registration was invalid; to the contrary, Magistrate Judge Caiazza, as approved by this Court, found that certificate to be valid, despite some inadvertent errors in plaintiff's

application. The dismissal was, rather, based upon plaintiff's failure to allege in the complaint any infringement of the copyrighted *song,* as opposed to the audiovisual material containing the song which plaintiff has not copyrighted. As such, the prior dismissal without prejudice was an invitation to plaintiff to cure the defect in the complaint, and not a judgment on the merits, which of course is a prerequisite to application of the principles of claim preclusion or res judicata. *See e.g., Cooter & Gell v. Hartmarx Corp.,* 496 U.S. 384, 396 (1990) (dismissal without prejudice does not operate as adjudication on the merits, "and thus does not have a res judicata effect"); *Venuto v. Witco Corp.,* 117 F.3d 754, 758-60 (3d Cir. 1997) (holding, as a matter of federal law, that absent unusual circumstances not present there or here, dismissal "without prejudice" has no res judicata effect); *Borelli v. City of Reading,* 532 F.2d 950, 951 (3d Cir. 1976) (per curiam, holding that dismissal without prejudice is an "implicit invitation to amplify the complaint"). Plaintiff has accepted the invitation to cure the defect identified in the first complaint, and so defendants' motion to dismiss is properly denied.

/s/_____
Donald J. Lee
United States District Judge

cc:
Francis X. Caiazza
U.S. Magistrate Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

[Filed May 2, 1997]

No. 96-2349

RAQUEL, a partnership,	)
Plaintiff,	)
	)
v.	)
	)
EDUCATION MANAGEMENT	)
CORPORATION, ART	)
INSTITUTES INTERNATIONAL,	)
INC., GEFFEN RECORDS, INC.,	)
NIRVANA, a partnership,	)
ELIAS/SAVION ADVERTISING,	)
INC., and PHILIP ELIAS,	)
Individually,	)
Defendants.	)
	)

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

I.

RECOMMENDATION

The Motion of the Defendant to Dismiss the Plaintiff's Complaint for failure to state a claim upon which relief can be granted filed pursuant to Federal Rule of Civil Procedure 12(b) (6) should be granted. The Motion of the Defendant to Dismiss the Plaintiff's Complaint for lack of subject matter jurisdiction filed pursuant to Federal Rules of Civil Procedure 12(b) (1) and 12(h) (3) should be granted. The motion of the Defendant in which it seeks a sanction in the form of the imposition of attorneys' fees should be denied. All claims, including the state law claims, should be dismissed without prejudice.

II.

REPORT

This action was commenced by the Plaintiff Raquel, a Partnership (Raquel), following the dismissal of a prior action which had been filed in the United States District Court for the Western District of Pennsylvania at Civil Action Number 95-1620. The facts in this action and in the preceding case are essentially the same.

Sometime in the fall of 1990 following a casting call, Philip Elias of Elias/Savion (Elias) spoke with William Covert (Covert), who is one of the Raquel partners, regarding plans to film a television commercial entitled "Before the Crowd Roars" (the Commercial) for Education Management Corporation (EMC). The Commercial apparently was

intended to accent the music industry educational programs offered at the schools which comprise the Arts Institutes International, which is operated by EMC. During the course of their discussion Covert informed Elias that Raquel had written an original song entitled "Pop Goes The Music" and that the song would possibly be appropriate for the proposed EMC commercial. Raquel subsequently provided Elias with a demonstration audiotape recording of the song and, following some negotiation, a license agreement was executed by Raquel and Elias on behalf of EMC which provided for the use of the song and Raquel's performance in the Commercial as well as Raquel's performance is a separate full length music video (the Video). The same footage was used in the finished Commercial and the finished Video.

The next significant material facts are these. On July 18, 1995, Raquel registered a federal copyright in "Pop Goes the Music" as an "audiovisual work." Based on it's registration, Raquel filed a copyright infringement action against the Defendants EMC, Geffen Records, Inc. (Giffen) and the partnership, Nirvana. In response Elias then filed a Motion to Dismiss pursuant to the provisions of Federal Rules of Civil Procedure 12 (b) (1) and 12 (h) (3). This court then dismissed the prior action for lack of subject matter jurisdiction. See Raquel v. Education Management Corporation, 41 USPQ 1434 (W.D. Pa. 1996). The court held that Raquel owned no copyrightable interest in the Commercial, which was identified as an audiovisual work, and that the copyright registration obtained by Raquel on July 18, 1995 could not serve as the basis for a valid claim of infringement. *Id.* at 1438-39.

The present action is based upon an alleged infringement which arose from the agreement which provided for the use of the song and Raquel's performance of "Pop Goes the Music" in the Video. In it's Complaint the Plaintiff alleges that an application was presented to the Register of Copyrights on July 18, 1995 for a Certificate of Registration for it's work and that a certificate was issued on the same date.[1] The certificate bears registration number PA 675-837. The nature of the work was entitled an "Audiovisual Work." *See* Compl. § 38, and Ex. 4. Next, on November 7, 1996 the Plaintiff caused an amendment to be forwarded to the Register of Copyrights. Under Section C of the amended application the Plaintiff identified the amplified information as "[t]wo copies of [the] 'Video' of Raquel performing [the] . . . song, 'Pop Goes The Music' now being filed separately with this amendment.' *See* Compl. § 39, and Ex. 5. Finally, the Plaintiff also filed a second amended application on December 20, 1996. *See* Compl. § 39.

Now before the court for resolution is the Motion of Defendants To Dismiss Plaintiff's Complaint Pursuant to

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[1] In filing this action the Plaintiff has relied on it's original Certificate of Registration which served as the basis of it's prior action and two amendments, identified separately as Complaint Exhibits 5 and 6. Also, in it's response to the Defendant's motions the Plaintiff has submitted Exhibit 6, which apparently is a new SR application. Because this application was filed immediately prior to the Plaintiff's motions response and since there is no proof that the application was approved for registration by the copyright office, exhibit 6 will assume no part in the resolution of the issues now before the court for determination.

Federal Rules of Civil Procedure 12(b) (1), 12(b) (6) and 12(h) (3) .

Motion to Dismiss, Procedural Standard - Rule 12(b) (6)

When considering a Rule 12(b) (6) motion to dismiss, the issue is not whether plaintiff will prevail in the end, or whether recovery appears to be unlikely or even remote. The issue is limited to whether, when viewed in the light most favorable to plaintiff, and with all well pleaded factual allegations taken as true, does the complaint state any valid claim for relief. In this regard, the complaint will not be dismissed merely because plaintiff's factual allegations do not support the particular legal theory he advances. Rather, the court is under a duty to independently examine the complaint to determine if the factual allegations set forth could provide relief under any viable legal theory. 5A Wright & Miller, Federal Practice & Procedure: Civil 2d § 1357 n.40; see also Conley v. Gibson, 355 U.S. 41, 45-46 (1957). Moreover, even a defective complaint will not be dismissed unless it appears to a certainty that the defect in the complaint can not be cured by amendment. See, for example, Neitzke v. Williams, 490 U.S. 319 (1989).

Finally, that part of the motion which was filed pursuant to the provisions of Federal Rules of Civil Procedure 12(b)(1) and 12(h)(3) raises the defense of subject matter jurisdiction.

DISCUSSION

1. The Registration of the Copyright.

A review of the record in this case reveals that Raquel has chosen to rely on it's original application, which was submitted on July 18, 1995, to define the present perimeters of its copyright ownership. Relatedly, in the prior action this court held that Raquel could not base it's copyright infringement action on an audiovisual work which, in actuality, was the Commercial authored by Elias/Savion. Specifically, the court held that "Raquel does not have a copyrightable interest in the Commercial" and that the Commercial "created by Elias/Savion represents a property right which fully satisfies the definition of an audiovisual work." *See* Raquel v. Education Management Corp., 41 USPQ. 2d 1434, 1438 (W.D. Pa. 1996).

In its supplemental registrations Raquel proceeds to disclaim any interest in the Commercial; however, it asserts an ownership interest in the "'Video' of Raquel performing [the] song, 'POP GOES THE MUSIC' now being filed separately with this amendment." *See* Compl., Ex. 5, section C. In substance, Raquel continues to claim an ownership right in the Video as a Audiovisual Work.[2]

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[2] The relevant regulations describe the supporting items which should accompany a copyright registration.

> The type of identifying material submitted should generally be appropriate to the type of work embodied . . . but in all cases should be that which best represents the copyrightable content of the

By regulation, the Register of Copyrights may publish procedures for supplemental registration in order to correct an error or amplify information submitted in the original registration. *See* 17 U.S.C. § 408(d) . In that regard, Section 201.5 of the Copyright Office Rules and Regulations states that a supplemental registration authorized by section 408(d) of the 1976 Copyright Act may be used to correct information which was incorrect at the time that the original registration was submitted to the copyright office. 37 C.F.R. § 201.5(b) (2) (I) (1985). A supplemental registration may also be used to include omitted information or to change facts which have unfolded since the submission of the original copyright information. 37 C.F.R. § 201.5(b) (b) (2) (ii) (1985). However, a supplemental registration may not be used "to reflect changes in the content of a work." 37 C.F.R. § 201.5(b) (2) (iii) (1985). Because the present action is founded on a copyright registration which embodies an "audiovisual work" and since Raquel has no property right interest in the Video, as will appear infra, the copyright registration as effectuated by the Plaintiff cannot support the

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> work. . . .
> (B) For audiovisual works, the deposit shall consist of . . . a videotape of the work depicting portions of the copyrightable content, . . .
> (C) For musical compositions, the deposit shall consist of an audiocassette or other phonorecord;
> (D) For sound recordings, the deposit shall consist of a reproduction of the entire work on an audiocassette or other phonorecord.

37 C.F.R. § 202.20(c) (2) (viii).

infringement claim. Accordingly, the Defendant's Motion to Dismiss should be granted.

2. The Interest of Raquel in the Video.

Next, the Copyright Act provides ownership rights to the "author" of a work. 17 U.S.C § 201(a). In that regard, a review of this record reveals that Elias was responsible for making the editing decisions regarding both the Commercial and the Video. (Elias Decl. at ¶l 6) (Temnick Dep. at 37). Relatedly, Elias developed a script and frame-by-frame shoot sequence which demonstrated the manner in which the Commercial would ultimately be videotaped. (Elias Dep. at 134-37.) Also, Elias directed the filming of the music video footage of Raquel's performance of "Pop Goes the Music". (Elias Decl. at ¶ 7.) The footage, as both scripted and directed by Elias, was then used in the final version of both the Commercial and the Video. (Elias Dep. at 150.) Next, after he received the audio tapes as mixed by the recording engineer, Elias proceeded to re-mix the song and thereby created the versions of the sound recordings which were used in the final versions of both the Commercial and the Video. (Elias Decl. ¶ 8.) These facts, which are not disputed, clearly reveal that Elias is the sole author of the video.

As a consequence, because the Video includes copyrightable materials which are distinct from the subject matter embodied in the song "Pop Goes the Music" its author is entitled to claim a separate property interest because it is clearly a derivative work. *See* Zuk. v. Eastern Pennsylvania Psychiatric Institute, 103 F.3d 294 (3d Cir. 1996) (a copyright in a preexisting work is distinct from a copyright in a derivative work). Parenthetically, a derivative work is

defined as "a work based upon one or more preexisting works, such as a translation . . . or any other form in which a work may be recast, transformed or adapted. A work consisting of editorial revisions, annotations, elaborations or other modifications which, as a whole, represent an original work of authorship, is a derivative work." 17 U.S.C. § 101. Here, the preexisting work is the song, "Pop Goes the Music", apparently composed by Raquel, and the derivative work is the Video, authored by Elias.

Because the copyright claimed by the Plaintiff has been improperly registered and, additionally, because Raquel has no ownership interest in the Video, this court lacks subject matter jurisdiction and the Motions to Dismiss as filed by the Defendant should be granted.

Finally, there has been no evidence introduced into this record which demonstrates that the Defendant Elias/Savion intended to share authorship in the Video with Raquel or that a copyrightable interest in the Video was transferred to the Plaintiff.

3. The Imposition of Counsel Fees

Regarding the question of sanctions, "'before a court can order the imposition of attorneys' fees under [28 U.S.C.] § 1927, it must find wilful bad faith on the part of the offending attorney.'" Zuk, 103 F.3d at 297, *quoting* Williams v. Giant Eagle Markets, Inc., 883 F.2d 1184, 1191 (3d Cir. 1989). Also, under Federal Rule of Civil Procedure 11 the court is provided with the authority to impose sanctions if it finds objective unreasonableness under the circumstances. *See* Martin v. Brown, 63 F.3d 1252, 1264 (3d

Cir. 1995), *citing* Jones v. Pittsburgh National Corporation, 899 F.2d 1350 (3d Cir. 1990). Relatedly, pursuant to Rule 11 a duty is imposed upon counsel "to make an inquiry into both the facts and the law which is "reasonable under the circumstances." Zuk, 103 F.3d 298. Here, the court does not find the existence of bad faith. Nor can the court, on this record, find objective unreasonableness because there may exist some factual basis which would support a cause of action properly commenced by Raquel in which it claims a copyrightable interest in the song "Pop Goes the Music." In other words, a claim instituted in some proper fashion may have a justiciable factual basis. Accordingly, the defendants motion in which it seeks the imposition of attorneys' fees should be denied.

4. The Appended Separate Claims of Common Law Fraud

Under the Judicial Improvements Act of 1990, "in any civil actior of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy. . . ." 28 U.S.C § 1367(a) . However, a district court may decline to exercise supplemental jurisdiction if it has dismissed the claims over which it has original jurisdiction. Growth Horizons, Inc. v. Delaware County, 983 F.2d 1277, 1284 (3d Cir. 1983). "In making its determination, the district court should take into account generally accepted principles of 'judicial economy, convenience, and fairness to the litigants.'" *Id.*, quoting United Mine Workers v. Gibbs, 383 U.S. 715, 726 (1966). Here, a fair weighing of the factors as delineated in Gibbs requires that the pendent state claims identified in the

Complaint as Count VII and Count VIII be dismissed, without prejudice.

In accordance with the Magistrates Act, 28 U.S.C. § 636 (b) (1) (B) and (C), and Rule 72.1.4 (B) of the Local Rules for Magistrates, objection to this report and recommendation are due by May 19, 1997. Responses to objections are due by May 29, 1997.

May 2, 1997

/s/_____
FRANCIS X. CAIAZZA
U.S. Magistrate Judge

cc:
Francis X. Caiazza
U.S. Magistrate Judge

APPENDIX F

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

[Filed December 10, 1999]

No. 98-3321

RAQUEL, a partnership, *Appellant*	)
v.	)
EDUCATION MANAGEMENT CORPORATION, ART INSTITUTES INTERNATIONAL, INC., GEFREN RECORDS, INC., NIRVANA, a partnership, ELIAS/SAVION, INC., and PHILIP ELIAS, individually *Appellees.*	)

SUR PETITION FOR REHEARING

Present: BECKER, Chief Judge, SLOVITER, MANSMANN, GREENBERG, SCIRICA, NYGAARD, ALITO, ROTH, McKEE,

RENDELL, BARRY ALARCON*, Circuit Judges

The petition for rehearing filed by appellant, Raquel, a partnership, in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is denied.

Chief Judge Becker and Judges Scirica, Nygaard, Alito and Rendell would have granted rehearing en banc.

By the Court

/s/_____
Circuit Judge

Dated: December, 10 1999

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* Hon. Arthur L. Alarcón, Senior Judge, United States Court of Appeals for the Ninth Circuit, sitting by designation, as to panel rehearing only.

APPENDIX G

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF PENNSYLVANIA

[Filed November 25, 1996]

No. 95-1620

RAQUEL, a partnership,
Plaintiff,

v.

EDUCATION MANAGEMENT CORP., Geffen Records, Inc., Nirvana, a partnership,
Defendants.

EDUCATION MANAGEMENT CORP.,
Third-Party Plaintiff,

v.

ELIAS/SAVION ADVERTISING, INC.,
Third-Party Defendant,

GEFFEN RECORDS, INC., Nirvana,
Third-Party Plaintiffs,

v.)
)
ART INSTITUTES)
INTERNATIONAL, INC.,)
Third-Party Defendant.)
)

MEMORANDUM ORDER

LEE, District Judge.

On October 10, 1996, this case was referred to United States Magistrate Judge Francis X. Caiazza for pretrial proceedings in accordance with the Magistrates Act, 28 U.S.C. §§ 636(b)(1)(A) and (B), and Rules 72.1.3 and 72.1.4 of the Local Rules for Magistrates.

The magistrate judge's report and recommendation, filed on October 11, 1996, recommended that the Motion to Dismiss (document number twenty-eight) filed by the Third Party Defendant Elias/Savion Advertising, Inc. against the original Plaintiff Raquel be granted, without prejudice. The report also recommended that although the Defendants - Education Management Corporation, Geffen Records, Inc. and Nirvana, a partnership - did not move for the dismissal of the Plaintiff's claims against them, these claims should likewise be dismissed, without prejudice, because the Plaintiff's action filed against the remaining Defendants is not based upon diversity of citizenship and because there is no subject matter jurisdiction. The Report further recommended that the pendent state claims likewise should be dismissed without prejudice because the court no longer has supplemental jurisdiction of the breach of contract and

conversion claims since there is no independent basis for federal jurisdiction of these pendent state claims. The parties were allowed ten (10) days from the date of service to file objections. Service was made on all parties and objections were filed by the Plaintiff Raquel and also by the third party Defendant Elias/Savion on October 28, 1996. After *de novo* review of the pleadings and documents in the case, together with the report and recommendation and objections thereto, the following order is entered:

AND NOW, this 25th day of November, 1996;

IT IS HEREBY ORDERED that the Motion to Dismiss (document number twenty-eight) filed by the Third Party Defendant Elias/Savion Advertising, Inc. against the original Plaintiff Raquel is granted, without prejudice.

IT IS FURTHER ORDERED that the action against. Education Management Corporation, Geffen Records, Inc. and Nirvana, a partnership, is also dismissed, without prejudice.

IT IS FURTHER ORDERED that because the Third-Party Plaintiffs; viz., Geffen Record, Inc and Nirvana have been dismissed, there now is no basis for their action against the Third-Party Defendant, Art Institutes International, Inc. Accordingly, the action against Art Institutes International, Inc., is likewise dismissed, without prejudice.

Finally, Elias-Savion's Motion for Counsel Fees is denied.

The report and recommendation of Magistrate Judge Caiazza, Document No. 34, dated October 11, 1996, is adopted as the opinion of the court.

MAGISTRATE JUDGES REPORT AND RECOMMENDATION

CAIAZZA, United States Magistrate Judge.

I.

RECOMMENDATION

The Motion to Dismiss (document number twenty-eight) filed by the Third Party Defendant Elias/Savion Advertising, Inc. against the original Plaintiff Raquel should be granted, without prejudice. Although the Defendants – Education Management Corporation. Geffen Records, Inc. and Nirvana, a partnership – did not move for the dismissal of the Plaintiff's claims against them, these claims should likewise be dismissed, without prejudice, because the Plaintiffs action filed against the remaining Defendants is not based upon diversity of citizenship and because there is no subject matter jurisdiction. Also, the court no longer has supplemental jurisdiction of the breach of contract and conversion claims because there is no independent basis for federal jurisdiction of these pendent state claims. Accordingly, the pendent state claims should be dismissed, without prejudice.

II.

REPORT

Procedural Background

The Plaintiff, Raquel, a musical partnership, consisting of band members William Covert, Ronald Alan English, Lawrence Sean McDonald, Eric Gadrix and Kevin Lawrence McDonald, filed this action on October 11, 1995, for copyright infringement under the Copyright Act of 1976, 17 U.S.C. § 101 *et seq.* against the Defendants Education Management Corporation (EMC), Geffen Records, Inc. (Geffen) and Nirvana, a partnership. EMC filed a Third Party Complaint against Elias/Savion Advertising, Inc. (Elias/Savion) seeking indemnification and/or contribution regarding its potential liability to Raquel.

In its Complaint, Raquel alleges that subject matter jurisdiction exists with this court pursuant to the provisions of 28 U.S.C. §§ 1331 and 1338 regarding its copyright infringement claim against EMC, Geffen and Nirvana. Relatedly, this action is premised upon an alleged infringement of a copyright based on an agreement entered into by Raquel, EMC and Elias/Savion, acting as the agent of EMC. The underlying facts are these.

Factual Background

Phillip Elias (Elias), President of Elias/Savion, was contacted by Greg Temnick of EMC in August of 1990 to produce television commercials for EMC. The commercials

were designed to focus on the music industry's educational programs offered by Art Institutes International, which is operated by EMC. One of the television commercials was entitled "Before the Crowd Roars." Elias commenced the project by directing the script preparation, which included a musical rock performance, and a search was conducted to hire musicians to perform in the commercials. The Plaintiff Raquel was the successful applicant.

Although Elias/Savion originally planned to use prerecorded music for the Commercial, Raquel submitted a demonstration tape of their own musical work entitled "Pop Goes the Music." EMC then agreed to use the Raquel song and, as a result Raquel, EMC and Elias/Savion executed a license agreement for the use of Raquel's musical work as well as their performance of "Pop Goes the Music" in the commercial. In its Complaint, Raquel generally alleges that the agreement provided for a three year license for the use of their original work "Pop Goes the Music" and "that the Defendant EMC continued to use the Subject Work in television advertising at various times after the end of the three year period without permission from the Plaintiff and thereby knowingly and willfully infringed upon the Plaintiff's copyright in the Subject Work." Compl. ¶ 27. The Plaintiff also claims that EMC, acting through Art Institutes International, entered into an agreement with the Defendants Geffen and Nirvana for a "video show which embodied and included the Subject Work." Compl. at ¶ 29. Also included in the Complaint are supplemental state claims based upon a breach of contract action and a conversion action.

Prior to commencing this action, Raquel's individual members registered a federal copyright which identified the

title of the work as "Pop Goes the Music" and the nature of the work as being an "Audiovisual Work." In that portion of the application document entitled "Nature of Authorship" each author described the work as "All music & lyrics & arrangements."

Now before the court for resolution is a Motion of Third Party Defendant Elias/Savion to Dismiss Plaintiff's Complaint Pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(h)(3).

Motion to Dismiss, Subject Matter Jurisdiction: Rule 12(b)(1) Standard

A Motion to Dismiss filed pursuant to the provisions of Federal Rule of Civil Procedure 12(b)(1) typically raises the question of the federal court's subject matter jurisdiction. The burden of proof regarding a 12(b)(l) motion rests with the party asserting jurisdiction. *Thomson v. Gaskil,* 315 U.S. 442, 62 S.Ct. 673, 86 L.Ed. 951 (1942). Fundamentally, the moving party questions the authority of the court to hear the case. Relative to the federal question issue, a case arises under federal law only if it is federal law that creates the cause of action. *Franchise Tax Bd. v. Construction Laborers Vacation Trust,* 463 U.S. 1, 103 S.Ct. 2841, 77 L.Ed.2d 420 (1983); however, jurisdiction may arise under federal law "where the vindication of a right under state law necessarily turns on some construction of federal law." *Id.* at 9, 103 S.Ct. at 2846. Next, in diversity cases, the plaintiff must demonstrate complete diversity of citizenship. *City of Indianapolis v. Chase National Bank,* 314 U.S. 63, 62 S.Ct. 15, 86 L.Ed. 47 (1941). Also, a court should not permit an amendment of the pleadings if subject matter jurisdiction

cannot be truthfully averred in the complaint. *Harrison v. Local 54, AFSCME,* 518 F.2d 1276 (3d Cir. 1975).

Position of Elias/Savion.

Elias/Savion claims that the Plaintiff Raquel admitted in its Complaint that the video-taped footage embodying Raquel's performance of the song (Pop Goes the Music) was produced by Elias/Savion for use in both the separate full length video of the band's performance of the song (the Video) and the commercial entitled "Before the Crowd Roars" (the Commercial) . *See* Br. in Supp. of Mot. to Dismiss at 5 (hereafter Def's Br.). Elias/Savion also refers the court to the Agreement appended to the Plaintiffs Complaint which states that "'*Elias/Savion will have sole right of creative decisions in regard to the final editing of all video mixes* resulting from the shoot.'" *See* Def.'s Br. at 5 (quoting Raquel Compl., Ex. 2 at Article Six) (emphasis in original).

Next, Elias/Savion claims that Elias is the true author of the audiovisual work which serves as the basis of Raquel's action. In that regard, Elias/Savion argues that Elias was "responsible for making *all* the editing decisions necessary to create the works in their *finished copyrightable forms*"; that prior to engaging the services of Raquel, Elias "created a script and a frame-by-frame shoot sequence of how the Commercial would be videotaped"; that "Elias personally directed the filming of the raw music video footage of Raquel's performance of the Song"; that "[t]his *same* footage, as scripted and directed by Mr. Elias, was used in both the finished video and the finished commercial"; and that "Mr. Elias personally made all the creative decisions in combining

the re-mixed sound recordings with the raw music video footage to create both the finished Video and the finished Commercial." *See* Def.'s Br. at 5, 6. (emphases in original).

Also, Elias/Savion claims that there was never any assignment of its copyrightable rights to either the Video or the Commercial to Raquel and that, as a consequence, "Raquel has never owned a valid federal copyright in the work upon which the claims of infringement in this action have been brought." *See* Def.'s Br. at 6, 7. Finally, Elias/Savion states that "by virtue of the unambiguous provisions of Articles Three and Six of the Agreement provided in Exhibit 2 to Raquel's complaint, both Raquel and their counsel had *complete knowledge,* at the time the federal copyright registration attached as Exhibit 4 to the Complaint was *filed,* that neither Raquel nor any of its members held any ownership interest in the 'audiovisual work' that is the subject of this action." *See* Def.'s Br. at 7. (emphasis in original).

Finally in its motion, Elias/Savion argues that: (1) this court lacks subject matter jurisdiction over this action since suit was instituted without a validly registered federal copyright; (2) none of the registrants for copyright in the audiovisual work upon which this suit was brought ever held an ownership right in that work; and (3) an award of attorney's fees is appropriate under these facts since the Plaintiff and its counsel had full knowledge of the falsity of the statements made to the copyright office at the time the copyright registration was filed.

Position of Raquel

Raquel agrees that it never claimed an ownership interest in the Commercial, either in its copyright application, or in its Complaint. It further states that Elias/Savion, acting as EMC's agent, bargained with Raquel for the use of the Plaintiff's song, Pop Goes the Music, and Raquel's performance of the song in the Commercial. *See* Pl.'s Br. in Opp'n to Dismiss Pl.'s Compl. at 3, 4 (hereafter Pl.'s Br.). Also, the Plaintiff states that "[a]s payment for use of the Song and for RAQUEL'S performance of the Song, Raquel was given a separate, full length Video of RAQUEL'S performance of the Song" and that "RAQUEL properly claimed a proprietary interest in both the Song and its performance of the Song, and in conjunction with its copyright registration, provided the Copyright Office with an audio-visual work which portrayed Raquel performing its original Song." Pl's Br. at 4.

Next, Raquel claims that "[a] careful reading of the Plaintiffs Copyright registration shows that Plaintiff only claimed authorship of the Song 'Pop Goes the Music' and more specifically, 'All music & lyrics & arrangements." The Plaintiff also states that "[T]he performance of this song . . . was in audiovisual form." Pl.'s Br. at 7. Relatedly, and in further support of its position, Raquel argues that "Elias/Savion well knows that the bargained-for performance and presentation of the Song 'Pop Goes the Music' by Raquel was recorded in audiovisual form" and that "[t]he parties did not bargain for a sound recording by Raquel." Pl.'s Br. at 9. Raquel proceeds by arguing that "[i]n Article One of the License Agreement drafted by and controlled by Phillip Elias, RAQUEL granted full usage rights of the recording, music

and lyrics, including lyric reprint rights, of (their original work) 'Pop Goes the Music'. . . ." Pl.'s Br. at 9. Continuing with its statement of position, the Plaintiff states that:

> The Agreement drafted by, and controlled by Phillip Elias . . . provides in Article Three, that 'RAQUEL reserves the right to use the song/video for the purpose of self-promotion'; in Article Five, 'Elias/Savion Advertising, for EMC, further agrees that it will provide one copy of a full-length video of the band's performance of the song as it will be recorded during the course of a television commercial shoot for EMC's Music and Video program'; in Article Seven, 'Elias/Savion Advertising agrees to deliver the edited video performance to RAQUEL in a timely manner. . . .' . . . ."

Pl.'s Br. at 10. Because of the specific terms of the agreement, RAQUEL then argues that it "has a right to register a copyright" of the song "Pop Goes the Music" and its performance of the work because Elias/Savion, acting as EMC's agent, bargained for a license to use the song and offered to the Plaintiff a fully edited videotape of Raquel's performance of the song "Pop Goes the Music."

Discussion

To satisfy the requirements of federal subject matter jurisdiction in this case, the Plaintiffs cause of action must necessarily arise under the Copyright Act. *American Well Works Co. v. Layne and Bowler Co.*, 241 U.S. 257, 36 S.Ct.

585, 60 L. Ed. 987 (1916). *See also* 17 U.S.C. §§ 101 *et seq.* In that regard, "an action arises under the federal copyright laws if and only if the complaint is for a remedy expressly granted by the Act, . . . or asserts a claim requiring construction of the Act. . . . or, at the very least and perhaps more doubtfully, presents a case where a distinctive policy of the Act requires that federal principles control the disposition of the claim." *Effects Assocs., Inc. v. Cohen,* 817 F.2d 72, 73 (9th Cir. 1987) (quoting *T.B. Harms Co. v. Eliscu,* 339 F.2d 823, 828 (2d Cir. 1964), *cert. denied,* 381 U.S. 915, 85 S.Ct. 1534, 14 L.Ed.2d 435 (1965)). Also, absent an infringement claim, federal courts decline jurisdiction. *Topolos v. Caldewey* 698 F.2d 991 (9th Cir. 1983). Relatedly, "[w]here there is a fatal flaw on the face of a complaint that purports to assert an infringement action, the suit should be dismissed for lack of subject matter jurisdiction. If no such flaw appears, the federal courts have jurisdiction." *Vestron Inc. v. Home Box Office, Inc.,* 839 F.2d 1380, 1382 (9th Cir. 1988) (citing *Bell v. Hood,* 327 U.S. 678, 681, 682, 66 S.Ct. 773, 776, 90 L.Ed. 939 (1946)). Finally, "'[t]he elements of a copyright infringement action are (1) ownership, of a valid copyright and (2) copying by the alleged infringer'" *Masquerade Novelty v. Unique Industries,* 912 F.2d 663, 667 (3d Cir. 1990) (quoting *Whimsicality, Inc. v. Rubie's Costume Co.,* 891 F.2d 452, 455 (2d Cir. 1989)). The issue now before the court for resolution is whether Raquel had a sufficient copyrightable interest in the subject matter of the work as described in the copy right application and, if so, whether it was properly alleged in the Plaintiff's Complaint.

As a general statement, "'[w]hether a case is one arising under . . . a law . . . of the United States . . . must be

determined from what necessarily appears in the plaintiff's statement of his own claim in the [complaint], unaided by anything alleged in anticipation of defenses. . . .'" *Franchise Tax Bd. of California v. Construction Laborers Vacation Trust,* 463 U.S. 1, 10, 103 S.Ct. 2841, 2846-47, 77 L.Ed.2d 420 (1983) (quoting *Taylor v. Anderson,* 234 U.S. 74, 75-76, 34 S.Ct. 724, 724-25, 58 L.Ed. 1218 (1914)). As a matter of general principle, if Raquel's Complaint alleges a bona fide infringement claim, then this court has subject matter jurisdiction.

In its argument Elias/Savion states that the undisputed facts "clearly show that Mr. Elias was *solely* responsible for the *entire creative input* necessary to produce both the [full length] Video and the Commercial *in their finished copyrightable form,* and is thus the actual author of the "audiovisual work" that is the subject of this action." Def.'s Br. at 13. It is without dispute that audiovisual works are a proper subject of copyright protection:

> "Audiovisual Works" are works that consist of a series of related images which are intrinsically intended to be shown by the use of machines or devices such as projectors, viewers, or electronic equipment, together with accompanying sounds, if any, regardless of the nature of the material objects, such as films or tapes, in which the works are embodied.

17 U.S.C. § 101. Considering the description immediately *supra,* it is clear that Raquel does not have a copyrightable interest in the Commercial. Conversely, the "Audiovisual

Works" created by Elias/Savion represents a property rights which fully satisfies the definitions of an audiovisual work. However, because musical works, including any accompanying words, can be the subject of a copyright the Plaintiff has a copyright interest in the song "Pop goes the Music." 17 U.S.C. § 102. The next sequential issue is whether Raquel obtained a copyright in its original song "Pop Goes the Music."

Relative to the substance of the Plaintiff's copyright claim, in its application Raquel identified the title of the work as "Pop Goes the Music" and it identified the nature of the authorship as "All music & lyrics & arrangements." In that regard, it is sufficiently clear that Raquel intended to obtain a copyright in its song, "Pop Goes the Music." Unfortunately, it described the nature of the work as being an "Audiovisual Work." However, an innocent omission or inclusion in a registration will not invalidate the copyright or render it incapable of supporting an infringement action. *Eckes v. Card Prices Update,* 736 F.2d 859 (2d Cir. 1984). *See also* M. Nimmer & D. Nimmer, Nimmer on Copyright, § 7.20, at 7-197 & 198 (1990) ("[A] misstatement or clerical error in the registration application if unaccompanied by fraud will not invalidate the copyright nor render the registration incapable of supporting an infringement action. This assumes, of course, that the work would have been eligible for a copyright registration had a correct statement of facts been contained in the registration application.")[1] Here, the

---

[1] *See* the Declaration of Edward C. Terreri, appended to Pl.'s Br. as Ex. B. in which he states that the copyright application was filed in good faith "with no intent to seek any greater rights for

court finds that the inclusion of the term "Audiovisual Work" was inadvertently included in the copyright application and, as a consequence, it did not invalidate the copyright of the music and lyrics to the song "Pop Goes the Music." However, the discussion does not end here.

As this court has already stated, "w[h]ere there is a fatal flaw on the face of a complaint that purports to assert an infringement action, the suit should be dismissed for lack of subject matter jurisdiction." *Vestron, Inc. v. Home Box Office, Inc.* 839 F.2d 1380, 1382 (9th Cir. 1988) (citing *Bell v. Hood,* 327 U.S. 678, 681-82, 66 S.Ct. 773, 775-76, 90 L.Ed. 939 (1946)). Also, in order to bring an action in federal court, the plaintiff must have first filed a valid federal copyright registration in the work upon which he or she has based the infringement claim. 17 U.S.C. § 409. The failure to satisfy this jurisdictional prerequisite deprives a federal court of subject matter jurisdiction. *Masquerade Novelty v. Unique Industries,* 912 F.2d 663, 667 (3d Cir. 1990); *see also Cameron v. Graphic Management Associates, Inc.,* 817 F.Supp. 19, 22 (E.D.Pa.1992).

In its Complaint the Plaintiff has alleged the following:

> Said musical video and TV commercial (hereinafter referred to as the "Subject Work"), upon being fixed in the tangible medium of a videotape, was published by Plaintiff with a notice of copyright on February 20, 1991.

RAQUEL than those which RAQUEL is entitled."

The Subject Work contains material wholly original in the Plaintiff that is copyrightable subject matter under the laws of the United States.

On or about July 18, 1995, Plaintiff applied to the Register of Copyrights for a Certificate of Registration in the Subject Work. The Certificate was issued by the Register of Copyrights on July 16, 1995, and bears registration number PA 675837. A true and correct copy of the certificate is attached as Exhibit 4.

Plaintiff is currently, and at all relevant times has been the sole proprietor of all right, title and interest in and to the Copyright in the Subject Work. Plaintiff has produced the Subject Work in strict conformity with the provisions of the Copyright Act of 1976 and all other laws governing copyright.

See Compl. ¶¶ 19, 20, 21, and 22.[2] A reading of the relevant allegations in the Complaint reveals that the subject matter of the cause of action as pled by Raquel is the full length musical video and the Commercial. However, as the court has stated *supra,* the Plaintiff has no copyrightable interest in the Commercial nor has the Plaintiff applied for and received a copyright of its performance of the song "Pop Goes the Music" as it appears in the full length video. Because the infringement claim as alleged in the Complaint is based upon the Commercial and not upon the musical work "Pop Goes

---

[2] The most direct reference to the original work "Pop Goes the Music" is found in paragraphs thirteen and twenty of the Complaint. Those paragraphs state that:

> As a result of said proposal and said negotiations, Plaintiff agreed to perform for the production of a music video and a TV commercial and Plaintiff agreed that Plaintiff's original song "Pop Goes The Music" would be used in the music video and TV commercial, as more fully described in a press release from Elias/Savion, dated December 14, 1990, a true and correct copy of which is attached hereto and marked as "Exhibit 1".

Compl. ¶ 13.

"The Subject Work contains material wholly original with Plaintiff that is copyrightable subject matter under the laws of the United States."

Compl. ¶ 20

However, a overall reading of the complaint clearly reveals that the Complaint alleges an infringement in the "Subject Work," which the Plaintiff identifies as the musical video and television commercial. *See* Compl. ¶ 19.

the Music" Elias/Savion's Motion to Dismiss should be granted, without prejudice.

Parenthetically, the court will make no determination regarding the right, of Raquel to copyright its performance of the song "Pop Goes the Music" as it appears in the full length video. In that regard, in its registration application Raquel did not apply for a copyright regarding its performance of the song and a determination of the Plaintiff's intellectual property right in the video would be advisory at this juncture.

Finally, because Raquel had a copyrightable interest in the song "Pop Goes the Music" it did not knowingly fail to advise the copyright office of facts which might have led to the rejection of its registration application. *See Whimsicality, Inc. v. Rubie's Costume Co.*, 891 F.2d 452, 456-57 (2d Cir.1989). Relatedly, although the Plaintiff has no interest in the Commercial, Raquel nevertheless has an ownership interest in both the music and the lyrics of the song "Pop Goes the Music." Accordingly, Elias/Savion's motion requesting attorney fees should be denied. Because Elias/Savion has prevailed in its Motion to Dismiss, the Plaintiff's Motion requesting attorney fees should also be denied.

Sua Sponte Dismissal of Remaining Defendants

The Motion to Dismiss filed by the Third Party Defendant Elias/Savion against the original Plaintiff Raquel should be granted, without prejudice. Also, although EMC, Geffen and Nirvana did not move for the dismissal of the Plaintiff's claims against them, these claims should likewise be dismissed because this action is not based upon diversity of

citizenship and because there is no federal question jurisdiction. *Berks Products Corp. v. Landreau,* 523 F.Supp. 304, 313 (E.D.Pa. 1981).

Parenthetically, the court recognizes that Geffen is a California corporation; however, the Raquel action against Geffen is based upon an alleged copyright infringement and is not premised upon diverse citizenship. Also, Raquel's claim against Nirvana is likewise based upon an infringement of the "Plaintiff's copyright in and to the Subject Work. . . ." *See* Compl. ¶ 49.

Pendent State Actions

Finally, the court does not have supplemental jurisdiction of the breach of contract and conversion claims because there is no longer an independent basis for federal jurisdiction. *See* 28 U.S.C. 1367(c)(3).

In accordance with the magistrates act, 28 U.S.C. § 636(b)(1)(B) and (C), and rule 72.1.4(B) of the local rules for magistrates, objections to this report and recommendation are due by October 28, 1996. Responses to objections are due by November 7, 1996.

APPENDIX H

FORM PA
UNITED STATES COPYRIGHT OFFICE
CERTIFICATE OF REGISTRATION
DATED JULY 18, 1995

CERTIFICATE OF REGISTRATION

This Certificate issued under the seal of the Copyright Office in accordance with title 17, United States Code, attests that registration has been made for the work identified below. The information on this certificate has been made a part of the Copyright Office records.

Marybeth Peters
REGISTER OF COPYRIGHTS
United States of America

OFFICIAL SEAL

FORM PA
For a Work of the Performing Arts
UNITED STATES COPYRIGHT OFFICE

R

PA 675-837

EFFECTIVE DATE OF REGISTRATION
Month JUL Day 18 Year 1995

77a

DO NOT WRITE ABOVE THIS LINE. IF YOU NEED MORE SPACE, USE A SEPARATE CONTINUATION SHEET.

1 TITLE OF THIS WORK ▼
Pop Goes The Music

PREVIOUS OR ALTERNATIVE TITLES ▼

NATURE OF THIS WORK ▼ See instructions
Audiovisual Work

2 a NAME OF AUTHOR ▼
William Covert
DATES OF BIRTH AND DEATH Year Born ▼ 1967 Year Died ▼
Was this contribution to the work a "work made for hire"? [ ] Yes [X] No
AUTHOR'S NATIONALITY OR DOMICILE Name of Country OR Citizen of ▶ U.S.A. Domiciled in ▶
WAS THIS AUTHOR'S CONTRIBUTION TO THE WORK Anonymous? [X] Yes [ ] No Pseudonymous? [ ] Yes [ ] No If the answer to either of these questions is "Yes," see detailed instructions.
NATURE OF AUTHORSHIP Briefly describe nature of material created by this author in which copyright is claimed. ▼
All music & lyrics & arrangements

b NAME OF AUTHOR ▼
Ronald Alan English
DATES OF BIRTH AND DEATH Year Born ▼ 1964 Year Died ▼
Was this contribution to the work a "work made for hire"? [ ] Yes [X] No
AUTHOR'S NATIONALITY OR DOMICILE Name of Country OR Citizen of ▶ U.S.A. Domiciled in ▶
WAS THIS AUTHOR'S CONTRIBUTION TO THE WORK Anonymous? [X] Yes [ ] No Pseudonymous? [ ] Yes [ ] No If the answer to either of these questions is "Yes," see detailed instructions.
NATURE OF AUTHORSHIP Briefly describe nature of material created by this author in which copyright is claimed. ▼
All music & lyrics & arrangements

c NAME OF AUTHOR ▼
Lawrence Sean McDonald
DATES OF BIRTH AND DEATH Year Born ▼ 1963 Year Died ▼
Was this contribution to the work a "work made for hire"? [ ] Yes [X] No
AUTHOR'S NATIONALITY OR DOMICILE Name of Country OR Citizen of ▶ U.S.A. Domiciled in ▶
WAS THIS AUTHOR'S CONTRIBUTION TO THE WORK Anonymous? [X] Yes [ ] No Pseudonymous? [ ] Yes [ ] No If the answer to either of these questions is "Yes," see detailed instructions.
NATURE OF AUTHORSHIP Briefly describe nature of material created by this author in which copyright is claimed. ▼
All music & lyrics & arrangements

0752755760 *0752755760*

the employee (see instructions). For any part of this work that was "made for hire" check "Yes" in the space provided, give the employer (or other person for whom the work was prepared) as "Author" of that part, and leave the space for dates of birth and death blank.

3 a YEAR IN WHICH CREATION OF THIS WORK WAS COMPLETED This information must be given in all cases. 1991 ◀ Year

b DATE AND NATION OF FIRST PUBLICATION OF THIS PARTICULAR WORK Complete this information ONLY if this work has been published. Month ▶ February Day ▶ 20 Year ▶ 1991
U.S.A. ◀ Nation

4 COPYRIGHT CLAIMANT(S) Name and address must be given even if the claimant is the same as the author given in space 2. ▼
RAQUEL
c/o Plowman, Spiegel & Lewis, P.C.
925 Grant Building, Pittsburgh, PA 15219

See instructions before completing this space.

TRANSFER If the claimant(s) named here in space 4 is (are) different from the author(s) named in space 2, give a brief statement of how the claimant(s) obtained ownership of the copyright. ▼
Claimant is a partnership of the five authors.
RAQUEL is the partnership name.

DO NOT WRITE HERE OFFICE USE ONLY
APPLICATION RECEIVED JUL 18 1995
ONE DEPOSIT RECEIVED
TWO DEPOSITS RECEIVED JUL 18 1995
FUNDS RECEIVED
1/2" VT/D

MORE ON BACK ▶ • Complete all applicable spaces (numbers 5-9) on the reverse side of this page • See detailed instructions • Sign the form at line 8.

DO NOT WRITE HERE
Page 1 of 5 pages

BEST AVAILABLE COPY

EXAMINED BY

CHECKED BY

CORRESPONDENCE
Yes

FORM PA

FOR COPYRIGHT OFFICE USE ONLY

DO NOT WRITE ABOVE THIS LINE. IF YOU NEED MORE SPACE, USE A SEPARATE CONTINUATION SHEET.

PREVIOUS REGISTRATION Has registration for this work, or for an earlier version of this work, already been made in the Copyright Office? 5

☐ Yes ☒ No If your answer is "Yes," why is another registration being sought? (Check appropriate box) ▼

a. ☐ This is the first published edition of a work previously registered in unpublished form.

b. ☐ This is the first application submitted by this author as copyright claimant.

c. ☐ This is a changed version of the work, as shown by space 6 on this application.

If your answer is "Yes," give: Previous Registration Number ▼ Year of Registration ▼

DERIVATIVE WORK OR COMPILATION Complete both space 6a and 6b for a derivative work; complete only 6b for a compilation. 6

a. **Preexisting Material** Identify any preexisting work or works that this work is based on or incorporates. ▼

See instructions before completing this space

b. **Material Added to This Work** Give a brief, general statement of the material that has been added to this work and in which copyright is claimed. ▼

DEPOSIT ACCOUNT If the registration fee is to be charged to a Deposit Account established in the Copyright Office, give name and number of Account. 7

Name ▼ Account Number ▼

CORRESPONDENCE Give name and address to which correspondence about this application should be sent. Name/Address/Apt/City/State/ZIP ▼

Edward C. Terreri, Esquire
Plowman, Spiegel & Lewis, P.C.
925 Grant Building
Pittsburgh, PA 15219

Area Code and Telephone Number ▶ (412) 471-8521

Be sure to give your daytime phone ◀ number

CERTIFICATION* I, the undersigned, hereby certify that I am the 8

Check only one ▼

☐ author

☐ other copyright claimant

☐ owner of exclusive right(s)

☒ authorized agent of RAQUEL

Name of author or other copyright claimant, or owner of exclusive right(s) ▲

of the work identified in this application and that the statements made by me in this application are correct to the best of my knowledge.

Typed or printed name and date ▼ If this application gives a date of publication in space 3, do not sign and submit it before that date.

Edward C. Terreri for Plowman, Spiegel & Lewis, P.C. date ▶ 7-17-95

Handwritten signature (X) ▼

Edward C. Terreri

MAIL CERTIFICATE TO

Certificate will be mailed in window envelope

Name ▼

Edward C. Terreri, Plowman, Spiegel & Lewis, P.C.

Number/Street/Apartment Number ▼

925 Grant Building

City/State/ZIP ▼

Pittsburgh, PA 15219

YOU MUST
- Complete all necessary spaces
- Sign your application in space 8

SEND ALL 3 ELEMENTS IN THE SAME PACKAGE
1. Application form
2. Nonrefundable $20 filing fee in check or money order payable to *Register of Copyrights*
3. Deposit material

MAIL TO
Register of Copyrights
Library of Congress
Washington, D.C. 20559-6000

9

The Copyright Office has the authority to adjust fees at 5-year intervals, based on changes in the Consumer Price Index. The next adjustment is due in 1996. Please contact the Copyright Office after July 1995 to determine the actual fee schedule.

*17 U.S.C. § 506(e): Any person who knowingly makes a false representation of a material fact in the application for copyright registration provided for by section 409, or in any written statement filed in connection with the application, shall be fined not more than $2,500.

July 1993—400,000 PRINTED ON RECYCLED PAPER

U.S. GOVERNMENT PRINTING OFFICE: 1993-342-582/80,018

78a

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CONTINUATION SHEET FOR APPLICATION FORMS

- This Continuation Sheet is used in conjunction with Forms CA, PA, SE, SR, TX, and VA only. Indicate which basic form you are continuing in the space in the upper right-hand corner.
- If at all possible, try to fit the information called for into the spaces provided on the basic form.
- If you do not have space enough for all the information you need to give on the basic form, use this continuation sheet and submit it with the basic form.
- If you submit this continuation sheet, clip (do not tape or staple) it to the basic form and fold the two together before submitting them.
- **Part A of this sheet is intended to identify the basic application.**
  Part B is a continuation of Space 2.
  Part C (on the reverse side of this sheet) is for the continuation of Spaces 1, 4, or 6.

FORM PA /CON
UNITED STATES COPYRIGHT OFFICE
RE

PA 675-837

PA PAU SE SEG SEU SR SRU TX TXU VA VAU

EFFECTIVE DATE OF REGISTRATION
JUL 18 1995
(Month) (Day) (Year)

CONTINUATION SHEET RECEIVED
JUL 18 1995

Page 3 of 3 pages

DO NOT WRITE ABOVE THIS LINE. FOR COPYRIGHT OFFICE USE ONLY

A Identification of Application

IDENTIFICATION OF CONTINUATION SHEET: This sheet is a continuation of the application for copyright registration on the basic form submitted for the following work:

- TITLE: (Give the title as given under the heading "Title of this Work" in Space 1 of the basic form.)

Pop Goes The Music

- NAME(S) AND ADDRESS(ES) OF COPYRIGHT CLAIMANT(S): (Give the name and address of at least one copyright claimant as given in Space 4 of the basic form.)

RAQUEL c/o Plowman, Spiegel & Lewis, P.C., 925 Grant Building, Pittsburgh, PA 15219

B Continuation of Space 2

d

NAME OF AUTHOR ▼: Eric Gadrix
DATES OF BIRTH AND DEATH: Year Born ▼ 1970 Year Died ▼

Was this contribution to the work a "work made for hire"? ☐ Yes ☒ No
AUTHOR'S NATIONALITY OR DOMICILE (Name of Country): OR { Citizen of ▶ U.S.A. / Domiciled in ▶ }
WAS THIS AUTHOR'S CONTRIBUTION TO THE WORK: Anonymous? ☒ Yes ☐ No Pseudonymous? ☐ Yes ☐ No (If the answer to either of these questions is "Yes" see detailed instructions)

NATURE OF AUTHORSHIP Briefly describe nature of the material created by the author in which copyright is claimed. ▼
All music & lyrics & arrangements

e

NAME OF AUTHOR ▼: Kevin Laurence McDonald
DATES OF BIRTH AND DEATH: Year Born ▼ 1966 Year Died ▼

Was this contribution to the work a "work made for hire"? ☐ Yes ☒ No
AUTHOR'S NATIONALITY OR DOMICILE (Name of Country): OR { Citizen of ▶ U.S.A. / Domiciled in ▶ }
WAS THIS AUTHOR'S CONTRIBUTION TO THE WORK: Anonymous? ☒ Yes ☐ No Pseudonymous? ☐ Yes ☐ No (If the answer to either of these questions is "Yes" see detailed instructions)

NATURE OF AUTHORSHIP Briefly describe nature of the material created by the author in which copyright is claimed. ▼
All music & lyrics & arrangements

075-275-576

f

NAME OF AUTHOR ▼
DATES OF BIRTH AND DEATH: Year Born ▼ Year Died ▼

Was this contribution to the work a "work made for hire"? ☐ Yes ☐ No
AUTHOR'S NATIONALITY OR DOMICILE (Name of Country): OR { Citizen of ▶ / Domiciled in ▶ }
WAS THIS AUTHOR'S CONTRIBUTION TO THE WORK: Anonymous? ☐ Yes ☐ No Pseudonymous? ☐ Yes ☐ No (If the answer to either of these questions is "Yes" see detailed instructions)

NATURE OF AUTHORSHIP Briefly describe nature of the material created by the author in which copyright is claimed. ▼

Use the reverse side of this sheet if you need more space for continuation of Spaces 1, 4, or 6 of the basic form.

79a

CONTINUATION OF (Check which): [ ] Space 1 [ ] Space 4 [ ] Space 6

C
Continuation of other Spaces

MAIL TO

Certificate will be mailed in window envelope

Name ▼
Edward C. Terreri, Plowman, Spiegel & Lewis, P.C.

Number/Street/Apt ▼
925 Grant Building

City/State/ZIP ▼
Pittsburgh, PA 15219

YOU MUST
- Complete all necessary spaces
- Sign your application

SEND ALL 3 ELEMENTS IN THE SAME PACKAGE
1. Application form
2. Nonrefundable $20 filing fee in check or money order payable to *Register of Copyrights*
3. Deposit material

MAIL TO
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Library of Congress
Washington, D.C. 20559-6000

D
Address for return of certificate

November 1994–100,000 PRINTED ON RECYCLED PAPER

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APPENDIX I

FORM CA
UNITED STATES COPYRIGHT OFFICE
SUPPLEMENTARY REGISTRATION
DATED NOVEMBER 6, 1996

82a

FORM CA

For Supplementary Registration
UNITED STATES COPYRIGHT OFFICE

REGISTRATION NUMBER

TX	TXU	PA	PAU	VA	VAU	SR	SRU	RE

EFFECTIVE DATE OF SUPPLEMENTARY REGISTRATION

Month Day Year

DO NOT WRITE ABOVE THIS LINE. IF YOU NEED MORE SPACE, USE A SEPARATE CONTINUATION SHEET.

A

TITLE OF WORK ▼

POP GOES THE MUSIC

REGISTRATION NUMBER OF THE BASIC REGISTRATION ▼	YEAR OF BASIC REGISTRATION ▼
PA 675-837	1995
NAME(S) OF AUTHOR(S) ▼	**NAME(S) OF COPYRIGHT CLAIMANT(S) ▼**
William Covert, Ronald Alan English, Laurence Sean McDonald, Eric Gadrix, Kevin Laurence McDonald	RAQUEL

B

LOCATION AND NATURE OF INCORRECT INFORMATION IN BASIC REGISTRATION ▼

Line Number ... Line Heading or Description ...

INCORRECT INFORMATION AS IT APPEARS IN BASIC REGISTRATION ▼

CORRECTED INFORMATION ▼

EXPLANATION OF CORRECTION ▼

C

LOCATION AND NATURE OF INFORMATION IN BASIC REGISTRATION TO BE AMPLIFIED ▼

Line Number 2a, b, c, d, e.. Line Heading or Description Nature of Authorship

AMPLIFIED INFORMATION ▼

Add to: All music and lyrics and arrangements
"and performance of song Pop Goes the Music"

EXPLANATION OF AMPLIFIED INFORMATION ▼

Additional description of claimants' authorship in the work, "Pop Goes The Music."

MORE ON BACK ▶ • Complete all applicable spaces (D -G) on the reverse side of this page.
• See detailed instructions. • Sign the form at space F.

DO NOT WRITE HER

Page 1 of ____ page

FORM CA RECEIVED

FORM CA

FUNDS RECEIVED DATE

EXAMINED BY

CHECKED BY

CORRESPONDENCE ☐

REFERENCE TO THIS REGISTRATION ADDED TO BASIC REGISTRATION ☐ YES ☐ NO

FOR COPYRIGHT OFFICE USE ONLY

83a

DO NOT WRITE ABOVE THIS LINE. IF YOU NEED MORE SPACE, USE A SEPARATE CONTINUATION SHEET.

CONTINUATION OF: (Check which) ☐ PART B OR ☐ PART C

D

DEPOSIT ACCOUNT: If the registration fee is to be charged to a Deposit Account established in the Copyright Office, give name and number of Account.

Name _____

Account Number _____

CORRESPONDENCE: Give name and address to which correspondence about this application should be sent.

Name Edward C. Terreri

Address 310 Grant Street

Pittsburgh (City) PA (State) 15219 (ZIP) (Apt)

Area Code and Telephone Number ▶ 412-471-8521

Be sure to give your daytime phone number

E

CERTIFICATION* I, the undersigned, hereby certify that I am the: (Check one)

☐ author ☐ other copyright claimant ☐ owner of exclusive right(s) ☒ duly authorized agent of RAQUEL (Name of author or other copyright claimant, or owner of exclusive right(s))

of the work identified in this application and that the statements made by me in this application are correct to the best of my knowledge.

Typed or printed name ▼ Edward C. Terreri

Date ▼ 11-6-96

Handwritten signature (X) ▼ Edward C. Terreri

F

MAIL CERTIFICATE TO

Name ▼ Edward C. Terreri

Number/Street/Apt ▼ 2nd Flr., Grant Bldg, 310 Grant Street

City/State/ZIP ▼ Pittsburgh, PA 15219

Certificate will be mailed in window envelope

YOU MUST:
- Complete all necessary spaces
- Sign your application in space F

SEND ALL ELEMENTS IN THE SAME PACKAGE:
1. Application form
2. Nonrefundable $20 filing fee in check or money order payable to Register of Copyrights
3. Deposit material

MAIL TO:
Register of Copyrights
Library of Congress
Washington, D.C. 20559-6000

G

The Copyright Office has the authority to collect fees at 5-year intervals, based on changes in the Consumer Price Index. The next adjustment is due in 1998. Please contact the Copyright Office in July 1997 to determine the actual fee amount.

*17 U.S.C. § 506(e): Any person who knowingly makes a false representation of a material fact in the application for copyright registration provided for by section 408, or in any written statement filed in connection with the application, shall be fined not more than $2,500.

December 1993—25,000

☆U.S. GOVERNMENT PRINTING OFFICE: 1993-301-241/80,000

APPENDIX J

May 14, 1997

Plowman, Spiegel & Lewis
ATTN: Edward C. Terreri
310 Grant Street, Grant Bldg, 2nd Flr.
Pittsburgh, PA 15219

Control Number: 80-518-9558(P)
Re: POP GOES THE MUSIC

Dear Mr. Terreri:

This letter follows our recent telephone conversations concerning the Form CA applications you submitted to amend a claim registered under number PA 675-837.

Our records show that the previous registration stated a claim in "music, lyrics, and arrangement" present in the videotape you deposited. Even though the song you sent was fixed on the soundtrack of a videotape, no claim was stated in the motion picture production at that time. Furthermore, we understand that the reference to "audiovisual work" on the application in space 1 did not extend the claim into the motion picture authorship present on the videotape, but simply identified the deposit format in which the song was fixed.

Your current Form CA applications attempt to add the term "performance" to the authorship statements of the previous registration; however, "performance" in a videotape carries with it the intention of motion picture production

authorship, albeit incompletely. The performance in a motion picture is an integral part of the motion picture and is not separable from the production. To register a claim in the motion picture, you might proceed with one of the following options.

If your client owned all rights in the production at the time the original Form PA application was filed to register the song, you may complete a new Form CA to adding complete authorship information about the motion picture production to the claim. Often a motion picture is created as a "work made for hire," and in such cases the employer would be named as legal author as in "XYZ Productions, Inc., employer for hire of the motion picture production" or "XYZ Productions, employer for hire of the cinematography."

If the author of the motion picture is different from the original claimant, "RAQUEL," also add a transfer statement explaining how the rights were acquired prior to the original filing, perhaps "by contract" or "by written assignment of copyright."

Or, if your client did not own all the rights in the production when the original application was filed but has acquired them since that time, file a Form PA application citing the previous registration at space 5 and stating the preexisting material at space 6a as "previously registered song." State the basis of this claim at space 6b as "motion picture production only" and give authorship information about the production in space 2 with no reference to the musical composition. See the enclosed Motion Picture Authorship Leaflet and Circular 9 for assistance.

Again, if any claimant named in space 4 is not an author of the production, include a brief statement explaining how the rights were transferred, perhaps "by contract" or "by written agreement."

If you have questions or need assistance, I can be reached at (202) 707-1948.

Please reply within 120 days and return the enclosed Reply Sheet referring to our Control Number.

Sincerely,

/s/_____
James Holloway, Senior Examiner
Performing Arts Section

Enclosures:
Form PA
Circular 9
MP Authorship Leaflet
Reply Sheet

APPENDIX K

17 U.S.C.

§ 102 Subject matter of copyright: In general

(a) Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include the following categories:

(1) literary works;
(2) musical works, including any accompanying words;
(3) dramatic works, including any accompanying music;
(4) pantomimes and choreographic works;
(5) pictorial, graphic, and sculptural works;
(6) motion pictures and other audiovisual works;
(7) sound recordings; and
(8) architectural works.

(b) In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.

§ 408. Copyright registration in general

(a) Registration Permissive. At any time during the subsistence of the first term of copyright in any published or unpublished work in which the copyright was secured before January 1, 1978, and during the subsistence of any copyright secured on or after that date, the owner of copyright or of any exclusive right in the work may obtain registration of the copyright claim by delivering to the Copyright Office the deposit specified by this section, together with the application and fee specified by sections 409 and 708. Such registration is not a condition of copyright protection.

* * *

(d) Corrections and Amplifications. The Register may also establish, by regulation, formal procedures for the filing of an application for supplementary registration, to correct an error in copyright registration or to amplify the information given in a registration. Such application shall be accompanied by the fee provided by section 708, and shall clearly identify the registration to be corrected or amplified. The information contained in a supplementary registration augments but does not supersede that contained in the earlier registration.

* * *

§ 410. Registration of claim and issuance of certificate

(a) When, after examination, the Register of Copyrights determines that, in accordance with the provisions of this title, the material deposited constitutes copyrightable subject matter and that the other legal and formal requirements of this title have been met, the Register shall register the claim and issue to the applicant a certificate of registration under the seal of the Copyright Office. The certificate shall contain the information given in the application, together with the number and effective date of the registration.

(b) In any case in which the Register of Copyrights determines that, in accordance with the provisions of this title, the material deposited does not constitute copyrightable subject matter or that the claim is invalid for any other reason, the Register shall refuse registration and shall notify the applicant in writing of the reasons for such refusal.

(c) In any judicial proceedings the certificate of a registration made before or within five years after first publication of the work shall constitute prima facie evidence of the validity of the copyright and of the facts stated in the certificate. The evidentiary weight to be accorded the certificate of a registration made thereafter shall be within the discretion of the court.

(d) The effective date of a copyright registration is the day on which an application, deposit, and fee, which are later determined by the Register of Copyrights or by a court of competent jurisdiction to be acceptable for registration, have all been received in the Copyright Office.

§ 411. Registration and infringement actions

(a) Except for actions for infringement of copyright in Berne Convention works whose country of origin is not the United States and an action brought for a violation of the rights of the author under section 106A(a), and subject to the provisions of subsection (b), no action for infringement of the copyright in any work shall be instituted until registration of the copyright claim has been made in accordance with this title. In any case, however, where the deposit, application, and fee required for registration have been delivered to the Copyright Office in proper form and registration has been refused, the applicant is entitled to institute an action for infringement if notice thereof, with a copy of the complaint, is served on the Register of Copyrights. The Register may, at his or her option, become a party to the action with respect to the issue of registrability of the copyright claim by entering an appearance within sixty days after such service, but the Register's failure to become a party shall not deprive the court of jurisdiction to determine that issue.

(b) In the case of a work consisting of sounds, images, or both, the first fixation of which is made simultaneously with its transmission, the copyright owner may, either before or after such fixation takes place, institute an action for infringement under section 501, fully subject to the remedies provided by sections 502 through 506 and sections 509 and 510, if, in accordance with requirements that the Register of Copyrights shall prescribe by regulation, the copyright owner –

(1) serves notice upon the infringer, not less than ten or more than thirty days before such fixation, identifying the work and the specific time and source of its first transmission, and declaring an intention to secure copyright in the work; and

(2) makes registration for the work, if required by subsection (a), within three months after its first transmission.

37 C.F.R.

§ 201.5. Corrections and amplifications of copyright registrations; applications for supplementary registration

(a) General. (1) This section prescribes conditions relating to the filing of an application for supplementary registration, to correct an error in a copyright registration or to amplify the information given in a registration, under section 408(d) of Title 17 of the Unites States Code, as amended by Pub.L. 94-553.

* * *

(b) Persons entitled to file an application for supplementary registration; grounds of application. (1) Supplementary registration can be made only if a basic copyright registration for the same work has already been completed. After a basic registration has been completed, any author or other copyright claimant of the work, or the owner of any exclusive right in the work, or the duly authorized agent of any such author, other claimant, or owner, who

wishes to correct or amplify the information given in the basic registration for the work may file an application for supplementary registration. (2) Supplementary registration may be made either to correct or to amplify the information in a basic registration. For the purposes of this section:

* * *

(ii) An amplification is appropriate: (A) To reflect additional information that could have been given, but was omitted, at the time basic registration was made [.]

* * *

37 C.F.R.

§ 202.3 Registration of copyright

(a) General.

(1) This section prescribes conditions for the registration of copyright, and the application to be made for registration under sections 408 and 409 of Title 17 of the United States Code, as amended by Pub.L. 94-553.

* * *

(b) Administrative Classification and Application Forms--

(1) Classes of Works. For the purpose of registration, the Register of Copyrights has prescribed the classes of works in which copyright may be claimed. These

classes, and examples of works which they include, are as follows:

* * *

(ii) Class PA: Works of the Performing Arts. This class includes all published and unpublished works prepared for the purpose of being performed directly before an audience or indirectly by means of a devise or process. Examples: Musical works, including any accompanying words; dramatic works, including any accompanying music; pantomimes and choreographic works; and motion pictures and other audiovisual works.

* * *